NORTHWESTERN PRITZKER SCHOOL OF LAW

March 05, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

It is my pleasure to give my highest recommendation for Charles Tso as a judicial clerk in your chambers. Charles was in my Anti-Discrimination Law course in the Fall 2020 semester and works as my research assistant this summer. As both a student and an employee, Charles has distinguished himself apart from his peers with his exceptional analytical and communication skills, unwavering work-ethic and drive, and sincere intellectual curiosity in the law. Charles is also nice, engaging, and warm, all with a good sense of humor.

Anti-Discrimination Law (ADL) was a virtual course in Fall 2020 due to the pandemic. Students had only experienced remote learning for a couple of weeks in the Spring term. The course delved deeply into the policy aims of ADL, its constitutional foundations, judicial interpretations of the statutes, and how and whether ADL is effective in addressing discrimination. In these tough and sensitive explorations, the students had to participate in class, write reflection papers, work as a team to analyze a Complaint, and write an analytical paper arguing how to amend a statute of their choosing to make it work truer to its purpose. Charles embraced and excelled in each of these challenges – so much so that I was thrilled by his interest in being a research assistant this summer and hired him in an instant.

Charles was a regular and most thoughtful participant in ADL. His comments enriched the learning experience not only through the substance of his remarks and engagement of the course materials but also in his thoughtful engagement with his classmates' ideas. I especially appreciated Charles's perspective as a former city planner when we discussed discrimination in public accommodation and zoning. Based on his performance in class and our conversations during office hours, I can say that Charles has demonstrated both the aptitude and appetite for understanding the breadth, complexity, and practical implications of anti-discrimination law jurisprudence.

Charles' research assistance this summer has reinforced my views on his abilities. When thinking about how best to use Charles' skills and aid me in the course development, I asked him to examine the syllabus, breaking down and critiquing the readings. His deep understanding of and appreciation for how I teach the course, how I use the materials, and how the assignments fit with the readings has enabled him to provide invaluable insight from the student perspective and will make the course stronger when I teach it in the coming year. Charles is extraordinarily self-directed, detail-oriented, and effective. First, Charles has proven his ability to deliver accurate results on time with minimal supervision. Even though he is working full-time at a law firm this summer, he has always balanced his time and effort. Second, he has demonstrated excellent communication and listening skills by providing insightful recommendations for my class and taking constructive critiques (which are few) with gratitude and grace. When he identifies areas of the class that can be improved, he explains what should be changed and why, and suggests solutions. Our conversations in this respect are deep, insightful, and thoroughly enjoyable. Third, I have especially appreciated his self-initiative and management skill as demonstrated by his effective file organization system, timely progress updates, and clear presentation of his thoughts on the materials, both those in current use and alternatives he has found for my consideration.

Charles is among the top students I have taught at Northwestern. Charles has demonstrated his superior skills in legal analysis and writing in his paper for ADL. Driven by his former experience as a city planner, Charles's paper thoughtfully addressed the lack of clear and uniform judicial application of the Fair Housing Act to protect tenants from post-acquisition discrimination and impute landlord liability for co-tenant harassment and proposed legislative solutions to clarify and strengthen the FHA. Charles possesses an impressive ability to balance many competing priorities and succeed under high levels of stress and uncertainty. Despite the challenges that come with being a transfer student in a fully virtual environment, Charles was always focused and prepared for class discussions all the while actively contributing to the Northwestern University Law Review and doing independent research for his case comment.

Having worked in a small, intimate office environment when I first practiced law, I can say wholeheartedly that Charles would be an invaluable asset in your judicial chamber and a valued colleague to your other staff. It is a genuine pleasure and honor for me to give my highest recommendation for Charles. If you have any further questions with regard to his background or qualifications, please do not hesitate to call me.

Respectfully,

Clifford Zimmerman
Professor of Practice
Northwestern Pritzker School of Law

Clifford Zimmerman - c-zimmerman@law.northwestern.edu - (312) 503-7043

Clifford Zimmerman - c-zimmerman@law.northwestern.edu - (312) 503-7043

NORTHWESTERN PRITZKER SCHOOL OF LAW

March 05, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write in enthusiastic support of Charles Tso's application for a clerkship in your chambers.

I met Charles in the spring of 2021, when he enrolled in my Federal Sentencing seminar. The class had only 15 students and focused on the intersection of sentencing theory and practice. From the first class, Charles distinguished himself as an exceptional student. He was consistently prepared and thoughtful in class and offered concise insights without dominating the conversation (something not all students can do!). When Charles spoke, he always added value – drawing threads from one case to another, building on a classmate's comment, asking excellent questions of guest speakers. Students completed a midterm examination and a final paper in the class, and Charles received A grades on both for his excellent analysis and exposition.

I recognize that all of the accolades set forth in the preceding paragraph can apply to any number of A-level students, but in my experience Charles has something that many of those students do not – a genuine intellectual curiosity. Throughout my class, Charles would send articles he had read or podcasts he had listened to that elaborated on the class content. It was clear to me that Charles was not sending these materials for extra credit, or to impress me; he was simply engaged with the class topic and the material we discussed, and he continued his exploration outside of class hours. Charles's contributions delighted me, and as a first-time instructor of this particular topic I incorporated many of his finds into class discussions (and will include them in the syllabus going forward). Although the work product in my class did not require outside research, Charles's thoughtful curation of outside resources (in addition, of course, to his work on the Law Review!) demonstrates that his approach to challenging topics will be both thoughtful and thorough.

Finally, I have enjoyed getting to know Charles on a personal level throughout the last few months, and in addition to all of the strengths described above I can affirm that he is a kind, warm person who converses easily and displays interest in others. I frequently witnessed Charles jumping in to help a struggling student in class, and in our conversations he provided keen insight about the class structure and dynamic. I have very much enjoyed working with him, and I believe he would be an exceptional asset to any chambers.

Please feel free to contact me should you have any questions or need additional information.

Very truly yours,
Jocelyn D. Francoeur
Director, Academic and Professional Excellence Program
Instructor of Law
Northwestern Pritzker School of Law

Jocelyn Francoeur - jocelyn.francoeur@law.northwestern.edu - (312) 503-2218

CENTER FOR APPELLATE LITIGATION
NEW YORK CITY

March 05, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write this letter in support of Charles Tso's clerkship application. I had the good fortune to supervise Charles as a summer intern while clerking for Judge Sterling Johnson in the Eastern District of New York in 2020. I am currently an appellate public defender in New York City at the Center for Appellate Litigation.

Among many interns in chambers that year, Charles quickly set himself apart through his ability to research thorny legal issues and to write in a voice far beyond that of most first-year law students. He earned my trust through his excellent work product to the point that I tasked him with writing the first draft of a major class certification order—an assignment that a first year intern would not ordinarily receive. He did not disappoint.

On a tight timeline, Charles familiarized himself with the record, performed the requisite legal research, and wrote a succinct draft that clearly applied the law. I would not have guessed that he had never encountered FRCP Rule 23 before, as we were soon deep in the weeds, discussing the merits of the motion before us. While the final order was much longer than his draft, due to additional related motions by both parties, most of the class certification discussion ultimately approved by Judge was language written by Charles.

I have found that most legal interns, particularly 1Ls, require a great deal of supervision. With a busy docket, providing them with a good experience can be incredibly time consuming. However, a small number stand apart and are unequivocally a net positive to the work environment. Charles was such an intern and could not have come at a better time considering the challenges of 2020. That summer, my attention was largely on the flurry of compassionate release motions we received from incarcerated individuals at high risk of severe illness from COVID-19. Thankfully, Charles produced high quality work with minimal supervision inherent to a remote work environment.

Finally, Charles' attitude and curiosity made him a pleasure to work with. In the height of the pandemic, he was a calming presence with a great sense of humor. He also evinced an interest in the law that exceeded the bounds of his assignments and led to many conversations about cases in the Second Circuit and the U.S. Sentencing Commission. Through these conversations, I've learned that Charles' concern for the public interest and curiosity for the law are both genuine.

Charles' written work product after just one year of legal education was remarkable. I have no doubt he has only continued to improve since. Without hesitation, I recommend him for a clerkship position in your chambers. Please do not hesitate to reach out if you'd like to discuss his application further.

Sincerely,

Bryan Furst
(206) 465-2217
bryansfurst@gmail.com

WRITING SAMPLE

Charles Tso
850 N. Dewitt Pl., Apt. 6F
Chicago, IL 60611
(562) 608-5999
charlestso2022@nlaw.northwestern.edu

This appellate brief was written for my legal writing class taught by Judge Denny Chin at Fordham University School of Law. The assignment was limited to fifteen pages and required outside research and adherence to the Bluebook citation format. This version was edited slightly by me and is submitted with Judge Chin's permission.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 20-0035

UNITED STATES OF AMERICA,

Appellee,

– v. –

BOBBY BLUE,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

Preliminary Statement

This is an appeal by defendant-appellant Bobby Blue from a judgment entered in the United States District Court for the Southern District of New York (Guinness Stout, J.), convicting him on one count of securities fraud. The district court's published opinion, which was filed on November 22, 2019, denied Blue's motion for a new trial. (A. 5–9).[1] Blue was sentenced principally to 25 years' imprisonment and filed a timely notice of appeal on January 22, 2020. (A. 1).

Issues Presented for Review

1. Whether the district court abused its discretion when it admitted evidence of Blue's wealth.
2. Whether the district court abused its discretion when it denied Blue's motion for a new trial pursuant to Fed. R. Crim. P. 33.

[1] "A." refers to the appendix filed with this brief.

Statement of the Case

A. The Facts

Blue was Chief Executive Officer and President of MicroBrew, a publicly traded beer company. He was arrested and indicted for securities fraud in June 2018. The indictment alleged that from fall 2016 through June 2018, Blue and two other executives—Peter Purple, Director of General Accounting, and Oscar Orange, Chief Operating Officer—directed accountants to inflate MicroBrew's publicly reported income by fraudulently reducing expenses.

B. The Proceedings Below

At a pre-trial hearing on September 5, 2019, the district court granted the Government's motion in limine to admit evidence of Blue's net worth, which was over $100 million, allegedly to show motive. Without any inquiry, the district court accepted the Government's argument that wealth evidence is permissible under *United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006) and said, "If the Second Circuit says it's okay, that's good enough for me." (A. 4). The district court then granted Defense Counsel's request for a limiting instruction to the jury. (*Id.*).

A jury trial commenced on September 10, 2019. A critical issue at trial was Blue's knowledge of the fraudulent accounting entries. Purple and Orange, who had pled guilty, testified pursuant to cooperation agreements. Purple testified that he had told Blue "everything." (A. 6). Orange testified that Blue said to him, "I know what the accounting people have done. I promise they will never have to do it again." (A. 7). Defense Counsel cross-examined Purple and Orange at length, suggesting that they had fabricated their testimony in return for leniency. The accountants testified that they had no communication with Blue. (A. 7–8).

Summation began on October 10, 2019, during which the Assistant United States Attorney ("the AUSA") engaged in a series of misconduct. The AUSA pointed his finger

menacingly at Blue and called him "[t]he one hundred million dollar man, a fraudster, a con." (A. 11). Defense Counsel objected. At the sidebar, the district court told the AUSA to "tone it down" but denied Defense Counsel's request for a curative instruction. (A. 12). The AUSA then said to the jury that Purple and Orange were in Blue's "[f]ancy, mahogany-paneled, high priced executive offices" when he plotted to "cheat the little guys who were thinking about buying stock in a beer company." (A. 14). Defense Counsel objected. The district court sustained the objection, instructing the jury that "your verdict must be based on the evidence presented at this trial and not on whether you think Mr. Blue is or is not a wealthy man." (*Id.*).

Undeterred, the AUSA told the jury that he was not asking them to convict Mr. Blue because he was "filthy rich." He said, "Greed. Mr. Blue and his executives-in-crime, that's what they cared about. Money. Corporate greed, all too familiar in this country today." (A. 15). Defense Counsel objected. The district court sustained her objection and instructed the jury that "'[c]orporate greed' is not on trial in this case. Your verdict must be based on the evidence presented in this case, or the lack thereof, as to this defendant, Bobby Blue." (*Id.*).

The AUSA also repeatedly vouched for the Government's witnesses during summation. After conceding that Purple and Orange pled guilty and were dishonest with law enforcement when they were arrested, the AUSA told the jury that "we need to believe the witnesses." (A. 13). The AUSA also claimed that the witnesses could tell them about this crime better than "virtually anyone." (*Id.*). He then proceeded to say, "We ask you to consider whether they are telling you the truth. These two witnesses told you the truth." (A. 14). Defense Counsel objected to all of these remarks, but the district court overruled her objections. (A. 13–15).

Having deliberated for six days and sent out several notes advising that it was deadlocked, the jury returned a guilty verdict on October 18, 2019, after the district court gave a

modified Allen charge. (A. 6–7); *see Allen v. United States*, 164 U.S. 492 (1896). Blue filed a timely motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure ("Rule 33"). The district court denied the motion on November 22, 2019. (A. 1). Blue was sentenced principally to 25 years' imprisonment on January 8, 2020, and filed a timely notice of appeal on January 22, 2020. (*Id.*). Blue appeals two rulings: (1) the district court's decision to permit the Government to introduce evidence of his net worth, and (2) the district court's denial of his Rule 33 motion for a new trial.

ARGUMENT

Point I. The District Court Abused Its Discretion by Admitting Wealth Evidence

A. The Standards for Admitting Evidence of Wealth

Evidence is admissible only if it is relevant. *See* Fed. R. Evid. 402. Evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. A district court may "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403. Evidence has probative value "if it tends to prove or actually proves a proposition." *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983). The probative value of evidence diminishes in proportion to "[t]he length of the chain of inferences necessary to connect the evidence with the ultimate fact to be proved . . . ." *United States v. Kaplan*, 490 F.3d 110, 122 (2d Cir. 2007) (citation omitted).

Evidence bears a risk of unfair prejudice when it has an "undue tendency to suggest decision on an improper basis," particularly "an emotional one." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (citation omitted). This Court and other Courts of Appeals have acknowledged that evidence of wealth can unduly prejudice the jury. *See, e.g.*, *United States ex*

rel. Miller v. Bill Harbert Int'l Const., Inc., 608 F.3d 871, 898 (D.C. Cir. 2010) ("The only way [evidence of defendants' wealth] could have affected the jury was to prejudice it."); *Quattrone*, 441 F.3d at 187 ("[E]vidence of compensation, wealth, or lack thereof can unduly prejudice jury deliberations . . . ."); *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 647 (6th Cir. 2005) ("[A] defendant's wealth could heighten the likelihood of juror caprice.").

On appeal, the standard for reviewing a district court's evidentiary rulings is abuse of discretion. *See United States v. Spoor*, 904 F.3d 141, 153 (2d Cir. 2018). The Court of Appeals generally gives deference to the district court's evidentiary rulings but will reverse for abuse of discretion if the district court's decision was arbitrary or irrational. *See United States v. Kelley*, 551 F.3d 171, 175 (2d Cir. 2009). A district court acts "arbitrarily or irrationally," and thus abuses its discretion, when it does not undertake a "conscientious assessment" of the evidence in light of the Rule 403 factors. *United States v. Salameh*, 152 F.3d 88, 110–11 (2d Cir. 1998).

B. The Evidence of Defendant's Wealth Was Improperly Admitted

1. The Evidence of Wealth Had No Probative Value

The district court improperly admitted evidence of Blue's wealth because his wealth did not have any tendency to make his guilt, or any fact that might establish it, more or less likely. The key issue at trial was whether Blue had knowledge of the fraudulent accounting entries; Blue's net worth gave no plausible inference whether he was more or less likely to have had such knowledge. *See United States v. Cusack*, 229 F.3d 344, 348 (2d Cir. 2000) (stating that courts are "reluctant to subscribe to the . . . theory that criminal intent may be inferred from a defendant's 'shopping list'" (citation omitted)); *United States v. Mullings*, 364 F.2d 173 (2d Cir. 1966) (holding that financial evidence is too speculative and remote to show motive).

Even if Blue's wealth had some relevancy, the district court nevertheless improperly

admitted it under Rule 403. The Government argued that evidence of wealth is admissible to show motive under *Quattrone*'s holding. (A. 3). However, *Quattrone* is distinguishable in one critical aspect—the evidentiary controversy involved the defendant's salary, not wealth, during a government investigation of his employer. The chain of inference between the defendant's salary and the alleged crime—obstruction of investigation—was short and direct. Quattrone's salary was probative of motive because it showed what he stood to lose if the government's investigation of his company found any wrongdoing. *See Quattrone*, 441 F.3d at 187.

Here, there is no direct nexus between evidence of wealth and the key issue at trial—Blue's knowledge in the accounting fraud. The Government presented no evidence that Blue had accrued any amount of wealth as a result of illegal activities at MicroBrew. In addition, the Government had no support for its theory that Blue was driven by greed. For example, it could not show that any unexplained or abrupt change in Blue's net worth occurred between fall 2016 and June 2018, *see United States v. Mitchell*, 172 F.3d 1104, 1109 (9th Cir. 1999) (holding that financial evidence may be admitted if it shows an abrupt and unexplained change of circumstances), or that Blue might have knowingly and financially benefited from fraudulent activities. *Cf. United States v. Chalhoub*, 946 F.3d 897, 907 (6th Cir. 2020) (holding that evidence of the defendant's income and expenditure was directly connected to the period of alleged illegal activity and showed a criminal motive). Because the Government failed to show that Blue's wealth is directly related to MicroBrew's performance, *Quattrone* is inapposite.

The Government's argument that Blue's wealth is probative of motive requires several leaps of logic. It proceeds as follows: wealth indicates greed; a greedy person will commit crimes to satisfy his desire for more money; and Blue was wealthy, so he directed accountants to commit fraud to benefit himself financially. This chain of inferences is at best attenuated and

speculative. *See Mitchell*, 172 F.3d at 1108–09 ("A rich man's greed is as much a motive to steal as a poor man's poverty. Proof of either, without more, is likely to amount to a great deal of unfair prejudice with little probative value"). Every corporate executive has an interest to see his or her company be profitable, but a business interest in profit is far from greed. *See id*. at 1109 ("A mere interest, unconnected with inclination, desperation, or other evidence . . . does not add much . . . to the probability that the defendant committed a crime."). Other courts have adopted the view that allegations that a defendant wants his or her company to appear profitable or sought to keep stock prices high are insufficient to show motive to defraud the public. *See, e.g.*, *City of Philadelphia v. Fleming Companies*, *Inc.*, 264 F.3d 1245, 1270 (10th Cir. 2001); *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 622 (4th Cir. 1999).

In sum, evidence of Blue's wealth proved neither knowledge nor motive; the probative value of this evidence was none.

2. The Danger of Unfair Prejudice Was High

Evidence of Blue's wealth was substantially prejudicial. Courts have long recognized that wealth-related evidence carries a significant risk of prejudice. *See*, *e.g.*, *Chalhoub*, 946 F.3d at 908; *United States v. Bradley*, 644 F.3d 1213, 1271 (11th Cir. 2011); *Quattrone*, 441 F.3d at 186. The persistent trend of widening income inequality has resulted in pervasive anti-corporate and anti-rich sentiment in today's political climate. Equating affluence with greed and corruption to exploit class prejudice is reversible error. *See United States v. Stahl*, 616 F.2d 30, 33 (2d Cir. 1980) (ordering a new trial "[b]ecause . . . appeals [to class bias] are improper and have no place in a court room . . . ."). Here, as in *Stahl*, a weak case against the defendant exacerbated the risk of class prejudice tipping the balance. Without any probative value, the evidence of Blue's net worth served only to inflame the jury's passion and class bias.

3. The Danger of Unfair Prejudice Substantially Outweighed the Evidence's Probative Value

A balancing of the evidence's probative value against its danger of unfair prejudice supports the conclusion that the district court abused its discretion in admitting the evidence of Blue's wealth.

The application of Rule 403 is "a fact-intensive, context-specific inquiry" because Rule 403 does not make evidence per se admissible or inadmissible. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008). As the record shows, the district court did not engage in this kind of inquiry. The district court overruled Defense Counsel's objection to the admission of wealth evidence based solely on the Government's words. Judge Stout said: "If the Second Circuit says it's okay, that's good enough for me." (A. 4). The district court did not thoroughly appraise the evidence's probative value and risk of substantial prejudice or inquire into *Quattrone*'s applicability to the present case. This Court has reversed evidentiary orders that rest on such arbitrary and careless applications of evidence law. *See*, *e.g.*, *United States v. Figueroa*, 618 F.2d 934, 942 (2d Cir. 1980) (deeming the fact that evidence could pass muster under one prong of Fed. R. Evid. 609 insufficient to "justify the automatic admission" of the evidence or to "assure that it has the requisite probative value under Rule 403").

The Government argues that the evidence's prejudicial effect was abated by the district court's limiting instruction reminding the jury that it could consider evidence of Blue's wealth only as it pertained to the issue of motive and could not convict Blue simply because he is wealthy. The district court's admirable instructions, however, did not sufficiently safeguard Blue from undue class prejudice. This Court has acknowledged that while juries are usually able to follow instructions, "there are limits upon the powers of jurors . . . to keep interconnected

thoughts separated from each other." *United States v. Kaplan*, 510 F.2d 606, 611 (2d Cir. 1974). Limiting instructions cannot eliminate the risk of unfair prejudice. If limiting instructions always guarantee that jurors would consider the evidence only for the purpose for which it was admitted, the balancing required by Rule 403 would be superfluous. Therefore, despite the limiting instruction, the district court abused its discretion when it failed to conscientiously weigh the probative value of wealth evidence against the risk of undue prejudice pursuant to Rule 403.

Point II. The District Court Abused Its Discretion in Denying Blue's Motion for A New Trial

A. Prosecutorial Misconduct

A defendant's motion for a new trial based on prosecutorial misconduct during the Government's summation is governed by Rule 33, which provides: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a).

To prevail on a motion for a new trial based on prosecutorial misconduct during summation, the defendant must show not only that a particular comment was improper, but that the comment, viewed in the context of the entire trial, was so severe and prejudicial that the resulting conviction was a denial of due process. *See United States v. Aquart*, 912 F.3d 1, 27 (2d Cir. 2018). The Second Circuit has identified three factors for courts to consider in determining whether prosecutorial misconduct caused substantial prejudice: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the certainty of conviction absent the misconduct. *See id*.

First, misconduct is severe when it involves repeated improper comments whose aggregate effect is likely to undermine the fairness of a trial. *See United States v. Melendez*, 57

F.3d 238, 241 (2d Cir. 1995). Isolated transgressions are insufficient to warrant a new trial. *See United States v. Shareef*, 190 F.3d 71, 79 (2d Cir. 1999). Second, curative measures must be "emphatic" to sufficiently cure any prejudice caused by the misconduct. *See United States v. Friedman*, 909 F.2d 705, 710 (2d Cir. 1990). Third, the certainty of conviction absent the misconduct is high when the evidence presented at trial is overwhelmingly against the defendant. *See United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 97 (2d Cir. 2014).

Prosecutorial misconduct can take on numerous forms, including, but not limited to, inflammatory statements and vouching. Statements that inflame the passion or prejudice of the jury are impermissible. *See Stahl*, 616 F.2d at 31. Personal attacks and name-calling are also improper. *See Bellamy v. City of New York*, 914 F.3d 727, 763 (2d Cir. 2019). Prosecutors may not personally vouch for the truthfulness of witnesses or evidence presented at trial. *See Certified Envtl. Servs., Inc.*, 753 F.3d at 94. Vouching is especially prejudicial if it gives the impression that there is additional evidence, not presented at trial but known to the prosecutor, supporting a guilty verdict against the defendant. *See id*.

The standard for reviewing a denial of a Rule 33 motion for a new trial is abuse of discretion. *See United States v. Banki*, 685 F.3d 99, 120 (2d Cir. 2012). A district court abuses its discretion "when (1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision . . . cannot be located within the range of permissible decisions." *United States v. Vinas*, 910 F.3d 52, 58 (2d Cir. 2018).

B. Blue Was Denied A Fair Trial

1. The Prosecutor's Misconduct Was Severe

The Government made numerous inflammatory statements—including name-calling and equating Blue's wealth with wrongdoing—to appeal to class prejudice. Descriptions of Blue's

fancy office and accusations of his scheming to cheat "the little guys," (A. 14), were intended to exploit the widespread anti-corporate sentiment in today's climate. *Cf. Stahl*, 616 F.2d at 32 (finding that the prosecutor's references to the defendant such as "multi-millionaire businessman," "Park Avenue office," and "driven by greed" were intended to inflame prejudice); *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940) (finding that appeals to class prejudice in a criminal trial is highly improper and cannot be condoned).

The Government also improperly suggested to the jury that "corporate greed" was evidence of Blue's guilt. (A. 15). *Cf. United States v. Burse*, 531 F.2d 1151, 1154 (2d Cir. 1976) (finding that the prosecutor's reference to the allegedly high incidence of bank robberies in his summation left open the inference that this trend is evidence of the defendant's guilt). These remarks, immaterial to Blue's knowledge of the fraudulent accounting entries, indicated a trial strategy designed to inflame passion and bias. *See Stahl*, 616 F.2d at 32–33.

Furthermore, the AUSA inappropriately vouched for Purple and Orange during summation, expressing his personal belief as to the witnesses' truthfulness. *See United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005). The Government's vouching undermined the fairness of the trial in two ways. First, the AUSA carried with him the authority of the United States Government; thus, his comments "induce[d] the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18 (1985). Second, because the jury knew that the AUSA had access to facts uncovered in the investigation, the jury likely would infer from prosecutorial vouching that there was additional inculpating evidence, not available to the jury, that supported the witnesses' credibility. *See Burse*, 531 F.2d at 1154–55 (finding that the prosecutor's statement that "we know certain testimony is true" left the impression that the Government had inculpatory evidence that was not given to the jury).

When the Government told the jury that Purple and Orange could tell them about the crime better than "virtually anyone," (A. 14), it was not only vouching but also commenting on Blue's failure to testify. It is axiomatic that the prosecutor may not comment on a defendant's failure to testify at trial. *See Griffin v. California*, 380 U.S. 609, 614 (1965) (holding that the Fifth Amendment forbids comment by the prosecution on a defendant's refusal to testify). The Government's comment, and the fact that the district court failed to properly instruct the jury that no adverse inference could be drawn from his failure to testify, violated Blue's Fifth Amendment right. *See United States v. Allen*, 864 F.3d 63, 81 (2d Cir. 2017) (holding that "[e]ven a negative comment by a judge or prosecutor on a defendant's silence violates [the] defendant's constitutional right" not to testify against himself at trial).

The Government argues that the comments made during summation were not so severe as to deprive Blue of a fair trial. First, it contends a prosecutor is permitted to advocate vigorously for his case and use colorful language in summation. *See United States v. Williams*, 690 F.3d 70, 74 (2d Cir. 2012). The Government argues that while the AUSA used colorful language to describe the defendant, those comments were within the proper bounds of vigorous advocacy. *See United States v. Rivera*, 971 F.2d 876, 884 (2d Cir. 1992). Second, the Government argues that prosecutors enjoy broad latitude to draw inferences from the evidence and suggest it to the jury in summation. *See United States v. Nersesian*, 824 F.2d 1294, 1327 (2d Cir. 1987).

Third, the Government contends that while a prosecutor may not vouch for his witnesses, he or she is permitted to rehabilitate the witnesses' credibility as a response to defense counsel's attack. *See Certified Envtl. Servs., Inc.*, 753 F.3d at 85–86. According to the Government, the AUSA was defending his witnesses in response to impeachment evidence in the trial record. *See Williams*, 690 F.3d at 74. Lastly, even if the AUSA's comments were improper, they were

isolated remarks, and, when "viewed against the entire trial," did not result in a denial of due process. *Id*. at 75.

The Government's arguments are unsound. Given the absence of relevant evidence on the issue of Blue's knowledge of the fraudulent accounting entries, the Government's abusive comments suggested that Blue's wealth was indicative of his criminal disposition and created the inference that he is guilty. *See Bellamy*, 914 F.3d at 763. Although a prosecutor has some latitude to respond to the defense's arguments, he may not violate the defendant's right to a fair trial. Thus, prosecutors may not personally vouch for witnesses just because defense counsel attacked their credibility. *See Certified Envtl. Servs., Inc.*, 753 F.3d at 86. The Government's vouching impermissibly gave the jury the impression that it had additional inculpatory evidence that was not presented at trial. *See United States v. Modica*, 663 F.2d 1173, 1178 (2d Cir. 1981).

The Second Circuit has held that prejudicial remarks during summation alone may be sufficient to taint a defendant's trial "with unfairness as to make his resulting conviction a denial of due process." *Bellamy*, 914 F.3d at 762. When viewed in the context of the entire trial and taken together, the repeated instances of prosecutorial misconduct revealed a persistent effort to misguide the jury's weighing of the evidence and substantially prejudice Blue.

2. The Curative Measures Were Insufficient

The district court's curative measures were insufficient to cure the undue prejudice arising from prosecutorial misconduct. The district court overruled every one of Defense Counsel's objections to vouching and never attempted to minimize any prejudice, for example, by ordering the remarks stricken and instructing the jury to disregard the Government's vouching. *See Modica*, 663 F.2d at 1179 ("The trial court erred in overruling [defendant's] objection. The trial judge should have stricken the remark and immediately instructed the jurors

to the effect that they could consider no evidence other than that presented to them . . . .”). Similarly, when Defense Counsel objected to the Government’s reference to Blue as the “one hundred million dollar man,” the district court only told the AUSA to “tone it down” at the sidebar and denied Defense Counsel’s request for a curative instruction. (A. 12). The lack of curative instructions permitted the Government to continue its appeal to class bias against Blue. *Cf. Friedman*, 909 F.2d at 710 (finding that sustaining an objection to improper prosecutorial comment with the comment “I don’t think that’s appropriate” to be insufficiently emphatic).

The Government argues that its misconduct did not substantially prejudice Blue during summation because the district court issued two curative instructions to correct any impression that the jury could consider the Government’s statements about Blue’s wealth or “corporate greed” as evidence of wrongdoing. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974) (finding that the trial court’s curative instruction mitigated the prejudicial effects of the prosecutor’s improper remarks). This argument overlooks the fact that “certain instances of misconduct are so severely prejudicial that no curative instruction can mitigate their effect.” *Floyd v. Meachum*, 907 F.2d 347, 356 (2d Cir. 1990). The effect of the Government’s remarks was of such a character in this case. Thus, although the district court’s instructions to the jury—that its verdict must be based on the evidence presented at this trial—were proper, they were insufficient to ameliorate the prejudicial effect of the Government’s misconduct.

3. Conviction Absent Misconduct Was Unlikely

The Government’s evidence was grossly inadequate to sustain a conviction beyond a reasonable doubt. Without the improperly admitted evidence of wealth and the prejudicial remarks during summation, the Government’s case depended solely on the testimony of its witnesses, whose credibility was dubious. Purple and Orange offered no compelling evidence

that Blue knew about the fraudulent accounting entries, and the accountants who made the false accounting entries testified that they had no communication with Blue. *See United States v. Berger*, 295 U.S. 78, 88–89 (1935) (holding that the case against the defendant was weak as it largely depended on the testimony from the Government's witness, who was the defendant's accomplice); *Certified Envtl. Servs., Inc.*, 753 F.3d at 97 (granting a new trial because the prosecution's evidence contained no "smoking gun," and relied heavily upon testimony from witnesses taking the stand pursuant to cooperation agreements). In addition, the fact that the jury had deadlocked and was only able to return a guilty verdict after the district court gave a modified Allen charge shows the Government's case was not overwhelmingly convincing.

In light of the overwhelming evidence that Blue was deprived of a fair trial, the district court abused its discretion in denying Blue's Rule 33 motion for a new trial.

Conclusion

For the foregoing reasons, Blue's conviction should be vacated, and the case should be remanded for a new trial.

Respectfully submitted,

Charles Tso
Amstel & Corona
233 Broadway, Suite 707
New York, NY 10279
Attorneys for Defendant-Appellant Bobby Blue

Dated: New York, New York
March 2, 2020

Applicant Details

First Name	**Daniel**
Last Name	**Turner**
Citizenship Status	**U. S. Citizen**
Email Address	**dfturner@pennlaw.upenn.edu**
Address	**Address** **Street** **41 Orchard St** **City** **Pleasantville** **State/Territory** **New York** **Zip** **10570** **Country** **United States**
Contact Phone Number	**9146295546**

Applicant Education

BA/BS From	**Duke University**
Date of BA/BS	**May 2014**
JD/LLB From	**University of Pennsylvania Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 15, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law & Innovation**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Keedy Cup**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Becker, Charles
chip.becker@klinespecter.com
Kyriakakis, Anthony
anthony.kyriakakis@gmail.com
Levy, Michael
mikel31556@gmail.com
610-574-6717
O'Connor, Courtenay
coconnor@squarespace.com
347-563-7494

This applicant has certified that all data entered in this profile and any application documents are true and correct.

March 03, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing to apply for a clerkship beginning in 2024. I am a third-year student at the University of Pennsylvania Law School. As a New Yorker and former intern at the United States Attorney's Office for the Southern District of New York, I would welcome the opportunity to give back to my community by working in your chambers.

I have enclosed my resume, law school transcript, undergraduate transcript, and a writing sample. In addition, I have included letters of recommendation from Judge Anthony Kyriakakis (anthony.kyriakakis@courts.phila.gov, 215-683-7139), Professor Michael Levy (mikel31556@gmail.com, 610-574-6717), and Professor Chip Becker (chip.becker@klinespecter.com, 215-796-2926). Since I met these individuals in a virtual academic environment, I have also included a letter from Courtenay O'Connor (coconnor@squarespace.com, 347-563-7494), my manager at Squarespace from 2017 to 2019. Michael Neff (michael.neff2@usdoj.gov, 917-579-2278), Assistant United States Attorney for the Southern District of New York and my summer 2020 internship mentor, is also willing to serve as a professional reference.

Please let me know if I can provide any additional information. I sincerely thank you for your consideration.

Respectfully,

Daniel Turner

DANIEL F. TURNER

Dfturner@pennlaw.upenn.edu ▪ 914-629-5546
41 Orchard St. ▪ Pleasantville, NY 10570

EDUCATION

University of Pennsylvania Law School, Philadelphia, PA
J.D. Candidate, May 2022
Honors: *Journal of Law & Innovation*, Senior Editor
Activities: Democracy Law Project, Mediation Clinic

Duke University, Durham, NC
B.A., Public Policy Studies, Minors: Economics, Psychology, May 2014
Activities: *DukeEngage* Guatemala, Duke Performing Arts Box Office & Information Desk

EXPERIENCE

Debevoise & Plimpton LLP, New York, NY Summer 2021
Summer Associate

- Assisted the Commercial Litigation team on a securities class action appeal and the White Collar & Regulatory Defense team on a cryptocurrency enforcement case

United States Attorney's Office, Southern District of New York, New York, NY Summer 2020
Legal Intern, Criminal Division

- Researched probable cause and jurisdictional issues, assisted with investigations, and attended remote hearings

Squarespace, New York, NY August 2015-July 2019
Trust & Safety Lead (2018-2019)
Trust & Safety Specialist (2015-2018)

- Led all content moderation efforts at a website hosting platform of 2 million+ users and reported directly to the General Counsel
- Drafted enforcement recommendations and guidelines for cases involving issues of privacy, intellectual property, defamation, hate speech, and explicit content
- Investigated and responded to user and third-party complaints; drafted public statements regarding sensitive content enforcement decisions
- Supported the legal team in complying with evolving areas of law and policy, such as the EU's General Data Protection Regulation (GDPR)
- Responded to subpoenas, court orders, and search warrants for user data
- Oversaw fraud mitigation efforts
- Drafted cease and desist letters to entities abusing Squarespace's intellectual property

Facebook, Austin, TX July 2014-July 2015
Contractor, Platform Risk

- Analyzed, escalated, and combated emerging fraud trends across Facebook payment platforms
- Commended for judgment in acting on suspected fraud; 97% peer reviewed accuracy rating

INTERESTS

- Film Festivals, The NY Mets, Running, Golf, Board Games

Daniel Turner
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Advanced Writing: Federal Litigation	Michael Rinaldi	A-	2.00
Constitutional Criminal Procedure	David Rudovsky	B+	3.00
Mediation Clinic	Douglas Frenkel	A	4.00
Sports as Legal Systems	Mitchell Berman	A-	3.00
Business Management	Rahul Kapoor	CR	3.00

Spring 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Administrative Law - UL	Sophia Lee	A	3.00
Corporations	David Hoffman	A	3.00
Gaming Law	Hon. Eric Fikry	A+	2.00
State Constitutional Law	Chip Becker	A	3.00
Keedy Cup Preliminaries	Gayle Gowen	CR	1.00
Law and Innovation Journal Seminar	Polk Wagner	CR	2.00

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Evidence	Michael Levy	A	4.00
Law of Autonomous Vehicles	Nolan Shenai	A	2.00
Law and Innovation Journal Seminar	Polk Wagner	A	2.00
Property	Gideon Parchomovsky	A	3.00
Sentencing	Hon. Anthony Kyriakakis	A	2.00

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Constitutional Law	Mitchell Berman	CR	4.00
Criminal Law	Paul Heaton	CR	4.00
Judicial Decision-Making	Hon. Anthony Scirica	CR	3.00
Internet Law	Christopher Yoo	CR	3.00
Legal Practice Skills	Reggie Govan	CR	2.00

Legal Practice Skills Cohort	Thomas Kienzle	CR	0.00

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Civil Procedure	Stephen Burbank	A-	4.00
Contracts	Leo Katz	B+	4.00
Torts	Allison Hoffman	A-	4.00
Legal Practice Skills	Reggie Govan	CR	4.00
Legal Practice Skills Cohort	Thomas Kienzle	CR	0.00

*** * * * * * * * * * * * COMMENTS * * * * * * * * * * * ***

The Law School adopted a mandatory Credit/Fail grading system for full-semester courses in Spring 2020 in response to the COVID-19 crisis.

Duke University

Official Transcript

Name: Daniel Francis Turner
Student ID: 1935751
Print Date: 09/18/2017

Degrees Awarded

Degree:	Bachelor of Arts
Confer Date:	05/11/2014
Plan:	Public Policy Studies (AB)
Plan:	Economics - Minor
Plan:	Psychology - Minor

Academic Program

Program:	Trinity College	Status: Completed Program
Plan:	Public Policy Studies (AB)	
Plan:	Economics - Minor	
Plan:	Psychology - Minor	

Beginning of Undergraduate Record

2010 Fall Term

Course		Description	Earned	Grade
ECON	1A	PRINCIPLES OF MICRO	1.000	AP
ECON	2A	PRINCIPLES OF MACRO	1.000	AP
ENGLISH	29	COMPOSITION & LANGUAGE	1.000	AP
HISTORY	18A	AMERICAN HISTORY, I	1.000	AP
HISTORY	18B	AMERICAN HISTORY, II	1.000	AP

Course		Description	Earned	Grade
AMI	148S	16MM FILM PRODUCTION	1.000	A-
MATH	31L	LABORATORY CALCULUS I	1.000	C+
PHIL	162	HUMAN RIGHTS-THEORY/PRAC	1.000	A-
PSY	11	INTRODUCTORY PSYCHOLOGY	1.000	A
Term GPA	3.425	Term Earned	6.000	

2011 Spring Term

Course		Description	Earned	Grade
ECON	55D	INTERMEDIATE MICROECONOMICS I	1.000	C-
SOCIOL	106	SOCIAL PSYCHOLOGY	1.000	B-
SPANISH	1	ELEMENTARY SPANISH 1	1.000	B-
WRITING	20	ACADEMIC WRITING	1.000	A
Topic:		BELIEF AND DOUBT		
Term GPA	2.775	Term Earned	4.000	

2011 Fall Term

Course		Description	Earned	Grade
PHIL	100	HST ANCIENT PHILOSOPHY	1.000	A
PSY	114	PERSONALITY	1.000	B+
PUBPOL	55D	INTRO TO POLICY ANALYSIS	1.000	B
SPANISH	2	ELEMENTARY SPANISH 2	1.000	B-
Term GPA	3.250	Term Earned	4.000	

2012 Spring Term

Course		Description	Earned	Grade
HISTORY	189I	PUBLIC HEALTH IN AMERICA	1.000	B+
PSY	102RE	COGNITIVE PSYCHOLOGY	1.000	B
PUBPOL	114	POL ANALY PUB POL MAKING	1.000	A
PUBPOL	171	CONTEMPORARY DOCUMENTARY FILMS	1.000	A-
Term GPA	3.500	Term Earned	4.000	

2012 Fall Term

Transfer Credit from UNIVERSITY OF NEW HAVEN - BARCELONA

Course		Description	Earned	Grade
ECON	300	ECONOMICS UPPER LEVEL ELECTIVE	1.000	TR
ECON	300	ECONOMICS UPPER LEVEL ELECTIVE	1.000	TR
PUBPOL	300	PUBPOL UPPER LEVEL ELECTIVE	1.000	TR
PUBPOL	300	PUBPOL UPPER LEVEL ELECTIVE	1.000	TR
SPANISH	100	SPANISH LOWER LEVEL ELECTIVE	1.000	TR*
		Transfer Earned	5.000	
Term GPA	0.000	Term Earned	4.000	

2013 Spring Term

Course		Description	Earned	Grade
CHEM	91	CHEM/TECHNOL/SOCIETY	1.000	A
CULANTH	206	ANTHROPOLOGY OF LAW	1.000	A
PUBPOL	302D	POL CHOICE/VAL CONFLICT	1.000	B+
STA	101	DATA ANALY/STAT INFER	1.000	B
Term GPA	3.575	Term Earned	4.000	

2013 Summer Term 1

Course		Description	Earned	Grade
POE	100	PRACTICE ORIENTED EDUCATION	0.000	
Topic:		STUDENT ENROLLED IN DUKEENGAGE		
Term GPA	0.000	Term Earned	0.000	

2013 Summer Term 2

Course		Description	Earned	Grade
POE	100	PRACTICE ORIENTED EDUCATION	0.000	
Topic:		STUDENT ENROLLED IN DUKEENGAGE		
Term GPA	0.000	Term Earned	0.000	

2013 Fall Term

Course		Description	Earned	Grade
MMS	370	MANAGERIAL FINANCE	1.000	A-
PHYSEDU	133	ADVANCED GOLF	0.500	S
PSY	474S	BIO PSYCH OF HUMAN DEVEL	1.000	A-
PUBPOL	304	ECON OF THE PUB SEC	1.000	B-
PUBPOL	590S	ADV TOP IN PUBLIC POLICY	1.000	B+
Topic:		SCIENCE LAW AND POLICY		
Term GPA	3.350	Term Earned	4.500	

2014 Spring Term

Course		Description	Earned	Grade
ARTSASCI	390	UNIVERSITY COURSE (TOP)	1.000	A
Topic:		SHELTER		
PHIL	447	PHILOSOPHY OF ENTREPRENEURSHIP	1.000	B+
PHYSEDU	170	YOGA	0.500	S
PUBPOL	120	INTERNSHIP	0.000	S
THEATRST	275S	ACTING FOR THE CAMERA	1.000	A
Term GPA	3.766	Term Earned	3.500	

Undergraduate Career Earned
Cum GPA: 3.362 **Cum Earned** 34.000

End of Official Transcript

Daniel Turner
dfturner4@gmail.com

KLINE & SPECTER
Attorneys at Law
The Nineteenth Floor
1525 Locust Street
Philadelphia, PA 19102

Direct Dial (215)772-1394
Chalres.Becker@klinespecter.com

March 03, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: Clerkship Applicant Daniel Turner

Dear Judge Liman:

I understand that Dan Turner has applied for a clerkship in your chambers following his graduation from the University of Pennsylvania Carey School of Law. I am Dan's professor in state constitutional law in spring 2021. This is a small class and I work closely with the students on both their written papers and oral presentations to the class. Based on that exposure, I strongly recommend Dan for a clerkship in your chambers.

For starters, he is a terrific law student. His mind is alive and alert to the legal issues presented in whatever topic we are addressing. I have observed this in his written work, which is thoughtful, well-organized, and beautifully presented. I have observed this equally in his presentations to the class, which have been well-prepared and impeccably delivered. Dan is fully engaged in class discussion as well, often contributing insightful comments that have expanded my appreciation of the material. Simply put, Dan has the intellectual and analytical skills to be an outstanding judicial law clerk.

More than that, Dan is pleasant, engaging, and personable—a terrific conversationalist. I enjoy his presence in class and working with him from week to week. Recalling my own clerkship experience, I appreciate that a judicial chambers is a close working environment that can be much like a family. Dan would be wonderful member of the family. You will just like having him around, both for his legal acumen and his general demeanor. I would be glad to speak by telephone about Dan if that seems appropriate.
Thank you for your attention to this recommendation—and I urge you to hire Dan as a clerk.

Respectfully,

Charles L. Becker

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

March 03, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: Clerkship Applicant Daniel Turner

Dear Judge Liman:

I write in strong support of Daniel Turner's application to clerk in your chambers. I had the pleasure of teaching Mr. Turner in my Sentencing course this past fall at Penn Law, where I am an adjunct professor. I also serve as a trial judge for our state court in Philadelphia.

From the start of the semester, Mr. Turner stood out as a top student. He was consistently prepared, and he brought his prior experience in the U.S. Attorney's Office (SDNY) to bear in the discussion as appropriate. He was one of those students who professors love to have in class—he made discussion better without dominating it—and he did so despite the challenges posed by participating in classes remotely on a Zoom platform. He also regularly met with me after class to continue our classroom discussions and probe more deeply into a number of criminal justice issues that interested him.

Mr. Turner's performance in the class was stellar. Of sixteen students, he was one of only two students to earn the highest grade of A+ on the final exam. His exam was also a pleasure to read, given his ability to spot and discuss a large number of issues with sophistication and a laser-like focus. He did a wonderful job of applying various course readings to unusual fact patterns—demonstrating an impressive ability to conduct a challenging analysis "on the fly" during a timed, three-hour exam. I was additionally impressed by his command of policy arguments and his ability to apply relatively complex punishment theories to the cases we had studied. He had a superb command of the course material. Moreover, I have no doubt that his skill as a clear and concise writer will serve as an enormous asset throughout his legal career, including his time spent as a law clerk.

I hope you will strongly consider making Daniel Turner a part of life in your chambers. I would be happy to expand on these impressions on the phone at your convenience.

Sincerely,

Anthony Kyriakakis
Lecturer in Law
Tel.: 215.683.7139
Email: anthony.kyriakakis@courts.phila.gov

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

March 03, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: Clerkship Applicant Daniel Turner

Dear Judge Liman:

I am writing this letter in support of the clerkship application of Daniel F. Turner. Mr. Turner was a student in my Evidence Class in Fall 2020. Before teaching Evidence at Penn, I was a trial lawyer for 50 years, 37 of them with the U.S. Department of Justice. As a result, I teach evidence not only as an academic topic, but also one with a focus on practical considerations for lawyers. Mr. Turner was an excellent student earning an A in the course. My class consisted of 29 students and I designated a panel of 6 to be on call for each class. The class met twice each week for about 2 hours. As a result, I heard each student just about every fifth class, so I was able to get to know something about most of them. Mr. Turner' class participation was excellent. He also came to my office hours regularly to confirm his understandings of issues. Too many students (and too many lawyers) consider this as a sign of weakness. I think it is a sign of both confidence and determination. His questions showed that he understood the material. In addition, he also asked about practical considerations of trial work, demonstrating an understanding that the law is not just theory.

Mr. Turner worked in law-related areas for four years after he had his bachelor's degree. That four years in the real world makes for a more mature student and his work in legal areas allowed him to choose to go to law school with an understanding of how the law works. I think that he would make an excellent addition to your chambers.

If you have any questions, feel free to contact me.

Respectfully yours,

Michael L. Levy
Adjunct Professor
mikel31556@gmail.com
610-574-6717

SQUARESPACE, INC. 225 VARICK STREET, 12TH FLOOR, NEW YORK, NY 10014

April 1, 2021

Your Honor:

I am the General Counsel of Squarespace, Inc. and Daniel Turner was one of my direct reports in his role as Squarespace's Trust & Safety Lead. I worked with Dan for approximately two years and I highly recommend him for a clerkship. He is a candidate of superior intellect and character with strong writing and critical thinking skills.

Squarespace provides its customers with the ability to create their own websites and online stores. Dan's responsibilities included combating fraud on Squarespace's platform, handling customer and third-party complaints and responding to subpoenas and law enforcement requests. His job involved a variety of U.S. and international legal considerations, including defamation, copyright, trademark, publicity rights, user generated content, restrictions on production of information to third-parties and data privacy. As a growing technology company at the forefront of consumer-facing internet issues, Squarespace, and our department in particular, confronts new and interesting issues on a regular basis. With a lean team, I relied on Dan to educate himself, meet competing priorities and independently design solutions to thorny problems, which often involved collaboration with departments across the company. He's professional, resourceful and practical. He's also a talented writer and an analytical thinker with strong judgment. As someone who had a judicial clerkship early in my legal career, I firmly believe that Dan's talents, work ethic and strong moral compass would make him a successful clerk.

I would be happy to speak further about Dan's characteristics and qualifications. Feel free to contact me at coconnor@squarespace.com.

Sincerely,

Courtenay O'Connor

Courtenay O'Connor
General Counsel

Dan Turner
Advanced Writing: Federal Litigation
Assignment #4: Summary Judgment Response Motion

WRITING SAMPLE: I wrote the below sample as an assignment in my *Advanced Writing: Federal Litigation* course. It has not been edited by anyone.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

BRANDON GULLEY, Plaintiff, v. MATT WEBB, JASON MURPHY, BOBBY THORPE, JOHN DOE I AND HAMBLEN COUNTY, Defendants.	Civil Case No. 2:10-CV-100 JURY DEMANDED

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Plaintiff Brandon Gulley, by and through counsel, opposes Defendants' motion for summary judgment.

Introduction

Defendants beat Brandon Gulley in and out of consciousness. They tortured him with a taser. They jumped on his ribcage and shoved his head in a toilet. All this activity occurred while Gulley, an inmate in Hamblen County, was restrained and defenseless. The correctional officers who perpetrated the attack did so without regard for the possible consequences; since Gulley had assaulted them, they figured they had a free pass.

But kicking a man while he is down is no more appropriate under existing case law than it is in a backyard brawl. Gulley thus brings an action under 42 U.S.C. §1983 for violations of his rights under the Fourth, Eight, and Fourteenth Amendments. Defendants' summary judgment

motion opposing the action is premised on the idea that Gulley's §1983 claim, if successful, would invalidate the assault conviction that Gulley has pled guilty to from that day. The assault and its aftermath, however, were separate incidents. Their legal elements do not overlap. Under Sixth Circuit precedent, the motion must be denied.

Statement of Facts

The Assault

On May 12, 2009, defendant correctional officers Matt Webb and Jason Murphy responded to a disturbance involving an inmate at the Hamblen County Detention Facility in Hamblen County, Tennessee. *Webb Affidavit.* That inmate was Brandon Gulley. *Id.* Upon arriving to the scene, an altercation between Gulley and the officers ensued. *Gulley Affidavit* at 3. Gulley later pled guilty to aggravated assault on the officers as a result of the altercation. *Id.* Tennessee's aggravated assault statute, T. C. A. § 39-13-102, states, in relevant part, that a person commits aggravated assault if they "after having been enjoined or restrained by an order, diversion or probation agreement of a court of competent jurisdiction from in any way causing or attempting to cause bodily injury or in any way committing or attempting to commit an assault against an individual or individuals, intentionally or knowingly attempts to cause or causes bodily injury or commits or attempts to commit an assault against the individual or individuals." T. C. A. § 39-13-102(c).

The Subsequent Abuse

After the assault occurred, defendant Gulley was rendered unconscious. *Gulley Affidavit* at 4. Unconscious and in restraints, Gulley offered no further threat to the officers or anyone else around him. *Id.* Instead of immediately transporting Gulley to the medical ward, the officers tasered Gulley, who was brought back to consciousness. *Id.* The officers then proceeded to abuse

and torture Gulley in a variety of ways. *Id.* at 5. One of the officers jumped onto Gulley's rib cage, injuring Gulley in the process. *Id.* Officer Webb slammed Gulley into a cage door and shoved his head into a toilet. *Id.* The officers repeatedly used the taser on Gulley, bringing him in and out of consciousness. *Id.* at 6. Later, Gulley was brought to a hospital that would treat him for the injuries the officers inflicted upon him. *Id.* at 7. On his way to the car that would bring him to the hospital, officer Webb punched Gulley in the head and quipped "One for the road, Bitch." *Id.* at 8. Gulley eventually returned from the hospital, but when he got back to his cell he was not permitted to clean the blood off of himself. *Id.* at 9.

Motion Standard

Summary judgment should be granted if "the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). But if a reasonable jury could return a verdict for the nonmoving party, summary judgment for the moving party is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party moving for summary judgment bears the initial burden of showing that there is no material issue in dispute. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). In reviewing a party's summary judgment motion, the court must not judge credibility or weigh conflicting evidence; it must instead believe the evidence of the nonmoving party and make all justifiable inferences in their favor. *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 507 (6th Cir. 2021).

Argument

The motion for summary judgment should be denied because Gulley's §1983 claim is independent of his assault conviction. The fact that Gulley pled guilty to assault does not mean

the officers got a free pass to abuse Gulley after he was subdued. A reasonable jury could find that the abuse underlying the §1983 claim took place after the assault ended.

I. The assault and subsequent abuse were distinct incidents.

A successful §1983 claim by Gulley would not undermine his assault conviction. In *Schreiber v. Moe*, the Sixth Circuit reversed the district court for improperly granting summary judgment in a similar action. *Schreiber v. Moe*, 596 F.3d 323, 326 (6th Cir. 2010). *Schreiber* was an excessive force case where the plaintiff had been convicted for resisting arrest. *Id*. at 328. The district court in the case reasoned that because the altercation between the plaintiff and defendant officer gave rise to both the conviction and the § 1983 claim, the § 1983 claim was barred. *Id.* at 334. But the Sixth Circuit reversed, noting that the case law demands a more precise inquiry, and "the mere fact that the conviction and the § 1983 claim arise from the same set of facts is irrelevant if the two are consistent with one another." *Id; See also Karttunen v. Clark*, 369 F. App'x 705, 708 (6th Cir. 2010) (reversing a district court's grant of summary judgment to a defendant for the same reason).

The *Schreiber* court also explained that nothing in the relevant resisting arrest statute suggested that the state must prove as an element of the crime that the police did not use excessive force. *Id.* Any excessive force used by the officer would not have provided the plaintiff with an affirmative defense to the charge of resisting arrest. *Id.* at 335.

Defendants state that Gulley pled guilty to aggravated assault and attempted escape, and that he now "seeks to negate an essential element of that conviction in a 42 U.S.C. § 1983 action." *Summary Judgment Memorandum* at 3. With regard to the attempted escape claim, Defendants did not attach any evidence to their motion showing that Gulley was indeed convicted of this charge. With regard to the aggravated assault conviction, notably absent from

Defendants' motion is an explanation of what exactly the "essential element" of that conviction is. What element in the Tennessee aggravated assault statute (T. C. A. § 39-13-102) would Gulley's § 1983 action negate? Defendants do not answer this question because no such element exists. The excessive force used by the officers would not be an affirmative defense to the action since the abuse occurred after Gulley had already been rendered unconscious and placed in restraints.

If anything, there was more of a connection between the conviction and the § 1983 action in *Schreiber* than there is here. For example, in *Schreiber*, the officer allegedly threw the plaintiff down, rubbed his face in glass, and punched him many times as the officer was placing the resistant plaintiff in custody. *Id*. at 328. Here, the abuses occurred after the assault on the correctional officers took place; Gulley was already restrained and in custody. Only after Gulley was rendered unconscious and defenseless did Defendants tase Gulley in and out of consciousness, jump on his ribcage, and shove his head in a toilet. *Gulley Affidavit*, 4-7. In addition, before being transported to the hospital, Defendant Webb slammed Gulley's head into a wall, as well as punched him in the head while saying "One for the road, Bitch." *Id*. at 8. A reasonable jury could find that each of these abuses occurred after Gulley was already subdued and that they thus have an attenuated relationship to the assault.

II. *Heck* does not apply here.

Defendants' motion rests on *Heck*'s holding that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into

question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." Critical to Defendants' motion is a footnote in *Heck* that states an example of "a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful" is a state defendant convicted of and sentenced for the crime of resisting arrest who then brings an action against the arresting officer for a Fourth Amendment violation. *Heck* at 486 N.6. This footnote, however, is premised on the assumption that the charge of unlawful arrest is "defined as intentionally preventing a peace officer from effecting a *lawful* arrest" and that, to bring a claim based on the right to be free from unreasonable searches, a plaintiff would need to show that the arrest was unlawful. *Id*.

Here, however, Gulley is not attempting to show that his conviction was unlawful. Indeed, he has already accepted responsibility for the assault by pleading guilty. Instead, Gulley is seeking to hold Defendants accountable for events that took place after assault. And as previously mentioned, the Tennessee assault statute does not contain overlapping elements with Gulley's § 1983 claim. Thus, to make a football comparison, Gulley's success on the § 1983 claim would not invalidate his assault conviction no more than successfully blocking an extra point would negate the touchdown that preceded it.

In support of their motion, Defendants improperly rely on a few cases that cite to *Heck*. Each of these cases predate *Schreiber*.

Defendants first cite to *Schilling v. White*, 58 F.3d 1081 (6th Cir. 1995) to show that the *Heck* rule applies to prisoners making § 1983 claims. In *Schilling*, a *pro se* plaintiff sought monetary damages for an allegedly unconstitutional search made during the course of his DUI arrest. *Id.* at 1082. The plaintiff, however, an inmate at the time, failed to demonstrate that his §

1983 claim would not necessarily invalidate his DUI conviction. *See id.* at 1083. He could not do so because the search did indeed lead to his conviction. *Id.* Here, unlike *Schilling*, the events underlying Gulley's § 1983 claim took place *after* the events underlying his conviction, and so a successful claim would not undermine the conviction.

Defendants make a similar temporal mistake when relying on *Brown v. City of Detroit*, 47 Fed. Appx. 339 (6th Cir. 2002). There, a prisoner brought a § 1983 claim alleging that "prior to his arrest, [an officer] shot him in his left arm, causing serious injury." *Id.* at *1. The prisoner had ultimately been found guilty of murder (among other charges) as a result of that altercation. *Id.* Thus, finding for the plaintiff on his § 1983 claim would have undermined his murder conviction since it would implicate the affirmative defense of self-defense. That stands in contrast to the case here, where again the abuse took place *after* the events that led to Gulley's assault conviction.

Defendants also mistakenly rely on *Ruiz v. Martin*, 72 Fed. Appx. 271 (6th Cir. Mich. 2003). In *Ruiz*, another *pro se* suit, plaintiff inmate sought damages for excessive force used during an altercation that resulted in him being convicted for assault. *Id.* at *1. Although the *Ruiz* court mentions in dicta that *Heck* would bar the plaintiff's § 1983 claim even if the plaintiff were already restrained, the court bases this conclusion on the fact that a hearing officer had already rejected the plaintiff's claim that he was acting in self-defense since there was "no medical evidence to prove any excess force was used against him." *Id.* at 3.

Here, since Gulley pleaded guilty to the assault conviction, there is no comparable record from a hearing officer. The affidavits by the officers that underlie Gulley's assault conviction also make no mention of the physical actions they took to restrain Gulley. A finding by a jury on

the abuse Defendants inflicted upon Gulley—and the injuries sustained by him—would thus not negate his assault conviction. Gulley's § 1983 claim should therefore be allowed to proceed.

Conclusion

For the foregoing reasons, Defendants' motion should be denied.

Dated: November 22, 2021

Respectfully Submitted,
/s/ Daniel Turner

Applicant Details

First Name	**Saumya**
Middle Initial	**K.**
Last Name	**Vaishampayan**
Citizenship Status	**U. S. Citizen**
Email Address	**saumya.vaishampayan@gmail.com**
Address	**Address** Street **103 Mercer Street, Apt. 4** City **Jersey City** State/Territory **New Jersey** Zip **07302** Country **United States**
Contact Phone Number	**908-723-2408**

Applicant Education

BA/BS From	**Tufts University**
Date of BA/BS	**May 2012**
JD/LLB From	**Rutgers School of Law--Newark** **https://law.rutgers.edu/**
Date of JD/LLB	**May 20, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Rutgers University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Chen, Ronald
ronchen@law.rutgers.edu
973-353-5551
Noll, David
david.noll@rutgers.edu
Godsil, Rachel
rachel.godsil@rutgers.edu
973-353-5535

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SAUMYA KELKAR VAISHAMPAYAN
103 Mercer Street, Apt. 4, Jersey City, New Jersey, 07302
908-723-2408 | saumya.vaishampayan@gmail.com

March 17, 2022

The Honorable Lewis J. Liman
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Dear Judge Liman:

I write to apply for a clerkship in your chambers for the term beginning in Fall 2024, or any term thereafter. I am a third-year student at Rutgers Law School and plan to join Ballard Spahr as an associate in New York after graduation.

My professional writing experience has prepared me to excel as a judicial clerk. As a reporter for *The Wall Street Journal*, I explained complex financial topics to readers in plain English—a skill I believe will help me write clearly about legal issues as a clerk. I have continued to refine my writing skills this year as a member of the Constitutional Rights Clinic. In my capacity as the lead student on our client's 28 U.S.C. § 2255 appeal, I conducted extensive legal research and helped draft the opening and reply briefs.

I have enclosed my resume, law school and undergraduate transcripts, and writing sample. The writing sample is an unedited excerpt of my Law Review Note, which will appear in the *Rutgers University Law Review* later this year. I have also enclosed letters of recommendation from the following professors:

Professor Ronald Chen	Professor Rachel Godsil	Professor David Noll
973-353-5378	917-304-2351	650-291-5445
ronchen@law.rutgers.edu	rachel.godsil@rutgers.edu	david.noll@rutgers.edu

Please let me know if I can provide additional information. I am available to meet at your convenience. Thank you very much for your consideration.

Respectfully,

Saumya Vaishampayan

SAUMYA KELKAR VAISHAMPAYAN
103 Mercer Street, Apt. 4, Jersey City, New Jersey, 07302
908-723-2408 | saumya.vaishampayan@gmail.com

EDUCATION

Rutgers Law School, Newark, NJ
J.D. Candidate, May 2022
GPA: 4.033
Honors: Merit Scholarship, Dean's List, Articles Editor for the *Rutgers University Law Review*
Activities: ABA First Amendment and Media Law Diversity Moot Court (2020-21), Teaching Assistant for Civil Procedure (Spring 2021), C. Willard Heckel Inn of Court (2020-21), Research Assistant for former Co-Dean David Lopez (Fall 2021), The Appellate Project (2021-22), Research Assistant for Professor Bernard Bell (Spring 2022)

Tufts University, Medford, MA
B.S. in Quantitative Economics, *cum laude*, May 2012
GPA: 3.63
Honors: Dean's List (Fall 2008, Spring 2009, Fall 2009, Spring 2010, Fall 2010, Spring 2012)
Activities: Tufts Marathon Team (Boston Marathon 2012), *The Tufts Daily*

PUBLICATIONS

Note, *Displaying Lenity: Why Courts Should Adopt a Presumption Against Copyright Infringement for Embedding and the Display Right*, 74 RUTGERS U. L. REV. __ (forthcoming 2022).

EXPERIENCE

Ballard Spahr, New York, NY
Media and Entertainment Law Group Summer Associate, June–July 2021
Accepted an offer for an Associate position. Researched and wrote memoranda on various aspects of defamation law. Helped draft an update on federal and state access law for the Practising Law Institute. Assisted in a series of public access lawsuits stemming from the U.S. Capitol riot. Spent three weeks working with attorneys at NBCUniversal's news group on a secondment from Ballard Spahr.

Dow Jones, New York, NY
Media Law and First Amendment Intern, June–August 2020
Drafted administrative appeals for Freedom of Information Act ("FOIA") and analogous state law requests. Wrote legal memoranda analyzing the Digital Millennium Copyright Act and Supreme Court jurisprudence on FOIA.

The Wall Street Journal, New York, NY and Hong Kong
Reporter, July 2014–May 2019
New York: Reported on the U.S. stock market, including in front-page and section-front articles. Analyzed derivatives markets to write enterprise stories about market volatility.
Hong Kong: Authored widely read articles on China's currency policy. Wrote features about macroeconomic trends across Asia, focusing on China and Japan. Collaborated with colleagues around the world on tight deadlines.

MarketWatch, New York, NY
Reporter, January 2013–June 2014
Spearheaded the website's coverage of bitcoin. Wrote about currencies and monetary policy.

INTERESTS

Spanish (conversational), half marathons, field hockey

RECORD OF: SAUMYA K VAISHAMPAYAN

STUDENT NUMBER: 121009588

RECORD DATE: 03/05/22 PAGE: 1

Fall 2019 RUTGERS LAW SCHOOL

PROGRAM: LAW
DEANS LIST

TITLE	SCH	DEPT	CRS	SUP	SEC	CRED	PR	GRADE
CONTRACTS	23	600	503		01	4.0		A+
CRIMINAL LAW	23	600	506		03	4.0		A
TORTS	23	600	511		04	4.0		A-
LEG WRIT RES SKILS I	23	600	520		09	2.5		A-
TOTAL CREDITS ATTEMPTED:						14.5		

DEGREE CREDITS EARNED: 14.5 TERM AVG: 3.943 CUMULATIVE AVG: 3.943

Spring 2020 RUTGERS LAW SCHOOL

PROGRAM: LAW
Degree Sought: JURIS DOCTOR

TITLE	SCH	DEPT	CRS	SUP	SEC	CRED	PR	GRADE
PROPERTY	23	600	508		03	4.0		PA
CIVIL PROCEDURE	23	600	509		03	4.0		PA
LEG WRIT RES SKIL II	23	600	521		09	2.5		PA
CONSTITUTIONAL LAW	23	600	522		03	4.0		PA
TOTAL CREDITS ATTEMPTED:						14.5		

DEGREE CREDITS EARNED: 29.0 TERM AVG: CUMULATIVE AVG: 3.943

COMMENTS:
Rutgers Law School adopted a mandatory pass/no credit (PASS/NOCR) for all courses this term as a result of COVID-19 and related university transitions.

Fall 2020 RUTGERS LAW SCHOOL

PROGRAM: LAW
DEANS LIST

TITLE	SCH	DEPT	CRS	SUP	SEC	CRED	PR	GRADE
JUSTICE IN AGE OF AL	23	600	570		61	2.0		A
BUSINESS ORGS	23	600	641		01	4.0		A
FIRST AMENDMENT	23	600	645		01	3.0		A
LAW REVIEW	23	600	762		01	0.5		PA
EVIDENCE	24	601	691		02	4.0		A-
TOTAL CREDITS ATTEMPTED:						13.5		

DEGREE CREDITS EARNED: 42.5 TERM AVG: 3.898 CUMULATIVE AVG: 3.922

Spring 2021 RUTGERS LAW SCHOOL

PROGRAM: LAW
DEANS LIST

TITLE	SCH	DEPT	CRS	SUP	SEC	CRED	PR	GRADE
ASP TEACHING FELLOW	23	600	542		01	2.0		PA
FEDERAL COURTS	23	600	586		01	4.0		A+
ELECT LAW&POLIT PROC	23	600	634		01	2.0		A+
COPYRT & TRADEMARK	23	600	651		01	3.0		A
LAW REVIEW	23	600	762		01	0.5		PA
PROFESSIONAL RESPONS	23	600	767		01	3.0		A+
TOTAL CREDITS ATTEMPTED:						14.5		

DEGREE CREDITS EARNED: 57.0 TERM AVG: 4.248 CUMULATIVE AVG: 4.021

** CONTINUED ON NEXT PAGE **

RECORD OF: SAUMYA K VAISHAMPAYAN

STUDENT NUMBER: 121009588

RECORD DATE: 03/05/22 PAGE: 2

TITLE	SCH	DEPT	CRS	SUP	SEC	CRED	PR	GRADE
Fall 2021 RUTGERS LAW SCHOOL								
PROGRAM: LAW								
Degree Sought: JURIS DOCTOR								
TRUSTS AND ESTATES	23	600	566		01	4.0		A
CONST RIGHTS CLINIC	23	600	699		01	8.0		A
ADMINISTRATIVE LAW	23	600	701		01	3.0		A+
LAW REVIEW	23	600	762		01	0.5		PA
TOTAL CREDITS ATTEMPTED:						15.5		
DEGREE CREDITS EARNED: 72.5 TERM AVG: 4.066 CUMULATIVE AVG: 4.033								
Spring 2022 RUTGERS LAW SCHOOL								
PROGRAM: LAW								
Degree Sought: JURIS DOCTOR								
ADV CON. LAW CLINIC	23	600	531		01	4.0		
ANTITRUST	23	600	611		01	3.0		
CRIM PRO:INVESTIGATE	23	600	647		02	4.0		
LAW REVIEW	23	600	762		01	1.0		
IMPLICIT BIAS&THELAW	23	600	778		01	2.0		
TOTAL CREDITS ATTEMPTED:						14.0		
DEGREE CREDITS EARNED: TERM AVG: CUMULATIVE AVG:								

Last Term Information

LAST TERM CREDIT HOURS:	15.5
LAST TERM CREDITS IN GPA:	15.0
LAST TERM POINTS IN GPA:	61.0
LAST TERM CUMULATIVE CREDITS IN GPA:	54.5
LAST TERM CUMULATIVE POINTS IN GPA:	219.8

***** END OF TRANSCRIPT *****

College of Liberal Arts
For more Transcript Key information, visit http://go.tufts.edu/transcript

Name: **Saumya Kelkar Vaishampayan**
Student ID: 1101616 **Birthdate:** 12/25/####

Print Date: 03/27/2018

Academic Program History

09/01/2008:	College of Liberal Arts Active in Program 09/01/2008:	Major - Undecided Major
09/07/2009:	College of Liberal Arts Active in Program 09/07/2009:	Major - Quantitative Economics Major
05/20/2012:	College of Liberal Arts Completed Program 05/20/2012:	Major - Quantitative Economics Major

Send To: Saumya Kelkar Vaishampayan

Degrees Awarded

Degree: Bachelor of Science
Confer Date: 05/20/2012
Major - Quantitative Economics - Cum Laude

Other Credits

Other Credits Applied Toward College of Liberal Arts

Course	Description	Earned
ENG 0001	Expository Writing	1.0
HIST AP	Ap History	1.0
Other Credit Total		2.0

Tufts Credits

Fall Term 2008

Course	Description	Earned	Grade	Points
EC 0005	Principles Economics	1.0	B+	3.333
EXP 0009	Freshmen Exploration Post Conflict Justice Pass/Fail	1.0	P	0.000
MATH 0011	Calculus I	1.0	A	4.000
PHIL 0001	Intro To Philosophy	1.0	A-	3.667
SPN 0003	Intermed Spanish I	1.0	A-	3.667

College of Liberal Arts
For more Transcript Key information, visit http://go.tufts.edu/transcript

Name: **Saumya Kelkar Vaishampayan**
Student ID: 1101616 **Birthdate:** 12/25/####

Print Date: 03/27/2018

	GPA	Attempted	Earned	GPA Units	Points
Term	3.67	5.00	5.0	4.00	14.67
Cumulative	3.67	5.00	7.0	4.00	14.67

Term Honor: Dean's List

Spring Term 2009

Course	Description	Earned	Grade	Points
ARB 0062	Modern Arabic Literature	1.0	A	4.000
EC 0011	Intermed Microecon Thry	1.0	A-	3.667
MATH 0012	Calculus II	1.0	A	4.000
PHY 0011	General Physics I W/lab	1.0	B+	3.333
SPN 0004	Intermed Spanish II	1.0	A	4.000

	GPA	Attempted	Earned	GPA Units	Points
Term	3.80	5.00	5.0	5.00	19.00
Cumulative	3.74	10.00	12.0	9.00	33.67

Term Honor: Dean's List

Fall Term 2009

Course	Description	Earned	Grade	Points
EC 0013	Statistics	1.0	A-	3.667
EC 0018	Quant Inter Macroec Thry	1.0	B+	3.333
ENG 0005	Creative Writing:fiction	1.0	A-	3.667
HIST 0048	South Asia & The World	1.0	B+	3.333
SPN 0021	Comp/conv I	1.0	A-	3.667

	GPA	Attempted	Earned	GPA Units	Points
Term	3.53	5.00	5.0	5.00	17.67
Cumulative	3.67	15.00	17.0	14.00	51.33

College of Liberal Arts
For more Transcript Key information, visit http://go.tufts.edu/transcript

Name: **Saumya Kelkar Vaishampayan**
Student ID: 1101616 **Birthdate:** 12/25/####

Print Date: 03/27/2018

Term Honor: Dean's List

Spring Term 2010

Course	Description	Earned	Grade	Points
ANW 0153	Seminar Ghana Gold Colloquium	1.0	A	4.000
EC 0016	Quant Inter Microec Thry	1.0	A-	3.667
MATH 0046	Linear Algebra	1.0	B	3.000
SPN 0022	Comp/conv II La Guerra Civil Espanola	1.0	A	4.000

	GPA	Attempted	Earned	GPA Units	Points
Term	3.67	4.00	4.0	4.00	14.67
Cumulative	3.67	19.00	21.0	18.00	66.00

Term Honor: Dean's List

Fall Term 2010

Course	Description	Earned	Grade	Points
EC 0340	Lat Am Ec:argn,Chile&mex	1.0	A	4.000
FAM 0340	Photo:way Explore City	1.0	A+	4.000
INTR 0099	Internship	1.0	A	4.000
SPN 0121	Adv Comp/conversation I	1.0	A	4.000

	GPA	Attempted	Earned	GPA Units	Points
Term	4.00	4.00	4.0	4.00	16.00
Cumulative	3.73	23.00	25.0	22.00	82.00

Term Honor: Dean's List

College of Liberal Arts
For more Transcript Key information, visit http://go.tufts.edu/transcript

Name: **Saumya Kelkar Vaishampayan**
Student ID: 1101616 **Birthdate:** 12/25/####

Print Date: 03/27/2018

Spring Term 2011

Course	Description	Earned	Grade	Points
BIO 0012	Human Reproduction & Dev	1.0	B	3.000
EC 0062	Econ Intern'l Migration	1.0	A-	3.667
EC 0107	Econometric Analysis	(1.0)	W	0.000
SOC 0040	Media And Society	1.0	B+	3.333

	GPA	Attempted	Earned	GPA Units	Points
Term	3.33	4.00	3.0	3.00	10.00
Cumulative	3.68	27.00	28.0	25.00	92.00

First Summer Term 2011

Course	Description	Earned	Grade	Points
EC 0177	Economics Organization	1.0	A-	3.667

	GPA	Attempted	Earned	GPA Units	Points
Term	3.67	1.00	1.0	1.00	3.67
Cumulative	3.68	28.00	29.0	26.00	95.67

Fall Term 2011

Course	Description	Earned	Grade	Points
EC 0107	Econometric Analysis	1.0	B	3.000
EC 0191	Intermed Selected Topics Quant Financial Econ	1.0	A-	3.667
ENG 0036	Asian American Writers	1.0	B+	3.333
SPN 0191	Special Topics Andes & Amazon Film/lit Pass/Fail	1.0	P	0.000

	GPA	Attempted	Earned	GPA Units	Points
Term	3.33	4.00	4.0	3.00	10.00
Cumulative	3.64	32.00	33.0	29.00	105.67

College of Liberal Arts
For more Transcript Key information, visit http://go.tufts.edu/transcript

Name: **Saumya Kelkar Vaishampayan**
Student ID: 1101616 **Birthdate:** 12/25/####

Print Date: 03/27/2018

Spring Term 2012

Course	Description	Earned	Grade	Points
COMP 0011	Intro Computer Science	(1.0)	W	0.000
EC 0119	Quant Games & Info	1.0	B+	3.333
EXP 0057	Experimental College Media Law And Ethics	1.0	B+	3.333
EXP 0099	Cms Internship Media Internships Pass/Fail	1.0	P	0.000
WS 0072	Intro Women Studies	1.0	A-	3.667

	GPA	Attempted	Earned	GPA Units	Points
Term	3.44	5.00	4.0	3.00	10.33
Cumulative	3.63	37.00	37.0	32.00	116.00

Term Honor: Dean's List

AS&E Undergrad Career Totals

Combined Cum GPA	3.63				
Totals		39.00	37.0	32.00	116.00

End of College of Liberal Arts

Rutgers Law School
S.I. Newhouse Center for Law and Justice
Rutgers, The State University of New Jersey
123 Washington Street
Newark, New Jersey 07102
(973) 353-5561

March 17, 2022
The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman,

I am very pleased and indeed honored to recommend with a great level of enthusiasm Saumya Vaishampayan, Law '22 for selection as a law clerk in your chambers.
Ms. Vaishampayan was a student in my Contracts class in Fall 2019 and is currently enrolled in my Federal Courts Class this semester (Spring 2021). Moreover, I have asked her to serve as a paid research assistant for me in a case that I am undertaking regarding the so-called "county line" on New Jersey ballots. I recite all this to show that that I have had a number of prolonged interactions with Ms. Vaishampayan that give me a reliable basis upon which to evaluate her skills and potential.

Regarding her academic abilities, she received the grade of A+ in first year Contracts, the highest grade in the entire class. That accomplishment speaks for itself. And while grades for Federal Courts are not yet known, her interactions in Federal Courts this semester demonstrate a deep understanding of very complex and abstract legal principles and an ability to pose the relevant issue with great precision.

No doubt her prior experience as a reporter and journalist has honed her ability to ask the right question, which I find in academic endeavors is most of the challenge in arriving at the correct answer. Moreover, given the difficulties were facing with remote instruction due to the pandemic, she took it upon herself to be one of the most active participants in class in order to keep the classroom dynamic flowing. I greatly appreciated this personal initiative in this difficult time.

I have come to know Ms. Vaishampayan very well in the past two years, and believe she is an exceptional student who will make a remarkable lawyer. She was one of the first students I thought of for the "county line" project, and despite what I am sure is a heavy workload, she immediately expressed interest. I am sure my work product will be richer with his contribution.

Please do not hesitate to contact me if there is any other information I can provide.

Sincerely yours,

Ronald K. Chen

University Professor, Distinguished Professor of Law and Judge Leonard I Garth Scholar

Ronald Chen - ronchen@law.rutgers.edu - 973-353-5551

Rutgers Law School
S.I. Newhouse Center for Law and Justice
Rutgers, The State University of New Jersey
123 Washington Street
Newark, New Jersey 07102
(973) 353-5561

March 17, 2022
The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman,

It's a privilege to recommend Saumya Vaishampayan for a clerkship in your chambers. A veteran financial reporter at the Wall Street Journal, Ms. Vaishampayan undertook a J.D. to pursue an interest in media law and has absolutely thrived at the law school. In nine years of teaching at Columbia and Rutgers, she is among the strongest students that I've recommended in terms of her ability to succeed in a clerkship. I very much hope you have the opportunity to interview her.

I got to know Ms. Vaishampayan when she was a student in my first year civil procedure course in the spring of 2020. That was the semester that the Covid-19 pandemic hit New Jersey. As a result, the first half of the class proceeded in a traditional in-person format, and the second half was conducted online.

In both components, Ms. Vaishampayan's performance was off the charts. She was one of a handful of students—one of whom who has since transferred to Harvard—who were consistently a step ahead of the class in terms of their engagement with the materials. Although the faculty decided to move to pass/fail grading for the spring 2020 semester, her performance on the midterm and final examinations would almost certainly have earned her an "A" had the course been graded in the ordinary manner. Nor was Ms. Vaishampayan's performance in civil procedure a fluke. In terms of grades, she is in the very top cohort—if not the strongest student—in Rutgers' 2022 J.D. class.

Ms. Vaishampayan's stellar academics are the product of many factors: she is curious, hard-working, ambitious, and highly effective in group settings. An important factor, however, is the research and writing experience that she brought to law school. Before law school, Ms. Vaishampayan spent six years as a reporter at MarketWatch and the Journal. As a glance at her publication record shows, she covered a wide range of topics, publishing hundreds of articles on Asian markets, cryptocurrency, and financial policy. She writes fluidly, with a natural sense of how to organize an argument. In contrast to many new attorneys, she understands how to write facts. These skills will be enormously valuable in a clerkship. I have no doubt that she will be able to make sense of even the most complex cases. And she will produce writing that consistently makes the court look good.

In the near future, Ms. Vaishampayan plans to work at Ballard Spahr's media law group in New York City. I am not certain where she will end up, but it will be a source of pride to have known her at the beginning of her career.

If you have any questions, please call and I will sing her praises some more.

Respectfully,

David L. Noll

Associate Dean for Faculty Development, Professor of Law

David Noll - david.noll@rutgers.edu

Rutgers Law School
S.I. Newhouse Center for Law and Justice
Rutgers, The State University of New Jersey
123 Washington Street
Newark, New Jersey 07102
(973) 353-5561

March 17, 2022
The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman,

I am delighted to recommend Saumya Vaishampayan for a clerkship in your chambers. Saumya was my student in Property her first year and I acted as her advisor for her student Note. She is among the strongest students I have taught in my decades of teaching. Her writing skills are extraordinary, her analytic capacities equal to the top students I taught at NYU and Penn Law Schools, and she has a tenacious work ethic. She will be a tremendous law clerk and have significant accomplishments in her legal career.

Saumya was in my Property class when the pandemic began last spring. Despite the trying conditions she remained completely determined to master property doctrine and the complexities associated with each unit. She was unfailing in her preparation and always contributed thoughtfully. She wrote the strongest mid-term and by far the strongest final exam – despite knowing the classes were all pass-fail, Saumya's exam would have been a top exam for any year. Her dedication was clearly not attributable merely to achieving a high grade – she genuinely loves the law and constantly sought to persevered and wrote a strong exam despite the extraordinary circumstances. Her GPA would be even higher had the second semester been graded because she would have received an A+ in my class.

Saumya regularly talked to me about her interests in the First Amendment and copyright, stemming from her impressive pre-law school career. Her Note topic was among the more ambitious I have encountered. I found true joy in working with her in light of her interest in extending her research to academically rigorous scholarship as well as excellent synthesis of legal doctrine. Unlike most student Notes, even among very strong students, my role was never line editing, but always engaging with her on the substance as she continued to develop her ideas. Her mastery of the complexities of copyright

As her resume attests, she is devoted to public service and has shown a tenacity in her pursuit of opportunities to develop legal experience in important sectors. Saumya will make herself invaluable in chambers due to her hard work, impressive skill-set, and positive attitude.

If you have any questions about Saumya's qualifications, please do not hesitate to call me at 917-304-2351.

Very truly yours,

Rachel D. Godsil
Professor of Law and Chancellor's Scholar

SAUMYA KELKAR VAISHAMPAYAN
103 Mercer Street, Apt. 4, Jersey City, New Jersey, 07302
908-723-2408 | saumya.vaishampayan@gmail.com

This writing sample is an excerpt of my Law Review Note. The editors of the *Rutgers University Law Review* selected my Note for publication, but the attached writing sample is an unedited and condensed version of my Note that remains my own work. My Note examines a common internet activity. Specifically, I assess whether a form of hyperlinking called "embedding" violates the Copyright Act's display right. Such a case might arise when a webpage designer "embeds" a copyrighted photo in her webpage, and the photographer sues the webpage designer for copyright infringement.

My Note concludes that copyright liability should not attach to embedding. Two factors drive this conclusion. First, the statutory text does not clearly capture "embedding" as an act that would violate the display right. Second, Congress relied on groups representing copyright owners to draft the statutory text, which resulted in strong copyright protections. Given that background, I argue that courts should counterbalance the influence of special interest groups on copyright law by applying a rule of lenity that prevents courts from finding that "embedding" infringes a copyright owner's display right.

Introduction

In February 2021, a local television station in Oklahoma City published an article on its website about a severe winter storm gripping the state, adding updates throughout the day in response to changing conditions.[1] In its 2:30 PM update to the article, the station included a Twitter post from a highway patrol official that contained three photos of a storm-related car crash outside of the city.[2] The station added the Twitter post to its article using a type of hyperlink called an "embedded link."[3] A visitor to the television station's website would see the article's headline, the article's text, and—thanks to the embedded link—the official's Twitter post containing photos of the crash. The process of adding an embedded link is known as "embedding."

Now imagine that the official did not take the photos herself. Instead, she posted them to Twitter without the photographer's permission. Can the photographer sue the station, as opposed to the official, for copyright infringement?

The Copyright Act of 1976 ("Copyright Act") bestows six exclusive rights upon copyright owners. Among these rights is the display right, which is the right "to display the copyrighted work publicly."[4] The question presented by the television station example is whether embedding violates a copyright owner's display right, and the answer requires courts to apply a statute written in the 1970s to practices made possible by subsequent technological changes.

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[1] *See Frigid Wind Chills Expected Monday Following Day of Heavy Snowfall, Crashes*, KOCO-TV (Feb. 15, 2021, 5:00 AM), https://www.koco.com/article/winter-storm-brings-heavy-snow-causing-hazardous-driving-conditions-across-oklahoma/35500508.

[2] *See id.* (showing a Twitter post from a highway patrol official with photos in the article's 2:30 PM update).

[3] *See How to Embed a Tweet on Your Website or Blog*, TWITTER: HELP CENTER, https://help.twitter.com/en/using-twitter/how-to-embed-a-tweet.

[4] 17 U.S.C. § 106(5).

Embedded links differ from other forms of hyperlinks because of how they deliver the linked content. Embedded links present the webpage viewer with elements from another webpage, like images, without requiring the webpage viewer to take an action, like clicking a link, to see the linked content.[5] In contrast, "surface links" refer the webpage viewer to the homepage of another website and require the viewer to click to see the linked content.[6] "Deep links" refer the webpage viewer deeper into another website, connecting the viewer to another website's interior webpage; they also require the viewer to click.[7]

Embedding presents a question of line drawing: courts must determine whether the embedding party, like the television station, has done enough to meet the statutory standard for infringing the display right by (1) displaying a copyrighted work and (2) doing so publicly.[8] Because embedding is so common, this unsettled area of copyright law has the potential to expose masses of internet users to liability.[9]

This Note argues that liability for copyright infringement should not attach to embedding. The first part examines the statutory text, legislative history, and the Constitution's Intellectual Property Clause to develop a deeper understanding of the display right.[10] It underscores that the statutory text does not specify how to determine who displays the copyrighted work when multiple parties are involved.[11] The second part analyzes the two leading cases involving

[5] Alain Strowel & Nicolas Ide, *Liability with Regard to Hyperlinks*, 24 COLUM.-VLA J.L. & ARTS 403, 408–09 (2001).

[6] *Id.* at 407, 409.

[7] *Id.* at 407.

[8] *See infra* Part I.A.

[9] Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 422 n.22 (2019) ("One recent study found that approximately one in four online news articles included an embedded link to a social media post.").

[10] *See infra* Part I.

[11] *See infra* Part I.A.

embedding and the display right.[12] The third part details theories of statutory interpretation that account for the influence of special interest groups in copyright law and proposes a solution for courts presented with copyright claims involving embedding.[13] Specifically, the third part argues that courts should not defer to legislative history when construing ambiguous provisions of the display right in the context of embedding.[14] By deferring to legislative history, courts give more power to the special interest groups that crafted the Copyright Act, to the detriment of members of the public who did not have the same influence over the drafting process.[15] This part argues that courts should instead apply a rule of lenity that prevents them from finding that embedding infringes a copyright owner's display right.[16] Courts thus act as a counterbalance to the legislative process when the statutory text is unclear, while ultimately allowing Congress to respond legislatively and resolve the ambiguities.[17]

Part I: Understanding the Display Right

The Copyright Act grants copyright owners the exclusive right to "display the copyrighted work publicly[.]"[18] The display right did not exist before 1976.[19] While unveiled by Congress as part of its effort to better protect copyrighted works against technological innovations enabling infringement,[20] the boundaries of this right have remained relatively

[12] *See infra* Part II.
[13] *See infra* Part III.
[14] *See infra* Part III.B.
[15] *See infra* Part III.B.
[16] *See infra* Part III.C.
[17] *See infra* Part III.C.
[18] 17 U.S.C. § 106(5).
[19] *See* H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5676 (explaining that the 1976 Act offered the "first explicit statutory recognition in American copyright law" of an exclusive display right).
[20] *See* H.R. REP. NO. 94-1476, at 47 (noting the "significant changes in technology" since the inception of U.S. copyright law that have led to new ways to violate copyright owners' exclusive rights, including those of reproduction and dissemination).

untested.[21] This part examines the statutory text, legislative history, and the Constitution's intellectual property clause to understand what the right protects.

A. Statutory Text

The display right implicates two statutorily defined terms: "display" and "publicly." Starting with the first term, "[t]o 'display' a work means to show a copy of it, either directly or by means of . . . any other device or process . . . ."[22] While the Copyright Act does not define "copy," it defines the plural of the word: "'Copies' are material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[23] The definition of "copies" in turn triggers the requirement for fixation: "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[24] When connected, the above definitions overlap, sometimes in confusing ways: for example, a copy cannot exist without fixation, which cannot occur without a copy.[25]

While the statute declares that a party who shows a copy of a copyrighted work by means of a process sufficiently "displays" the work, it leaves unclear how that definition applies to

[21] *See* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy over Ram "Copies"*, 2001 U. ILL. L. REV. 83, 84; Jie Lian, Note, *Twitters Beware: The Display and Performance Rights*, 21 YALE J. L. & TECH. 227, 245 (2019) ("[T]he display right issue has rarely been adjudicated.").

[22] 17 U.S.C. § 101.

[23] *Id.* A copy also includes the original work. *Id.*

[24] *Id.*

[25] *See id.* (stating that "copies" are material objects in which a work is "fixed," which requires an embodiment in a copy).

situations in which multiple parties utilize multiple processes that ultimately show a work.[26] In the context of embedding, does the embedding process show the work as well as the process involved in posting the image online? That is, for the purposes of the Copyright Act, who is the legally cognizable displayer: the embedding party or the party that posted the photo to the internet?

A violation of the display right requires a *public* display.[27] The Copyright Act's definition of "publicly" applies to the performance and display rights and includes two clauses: one for the analog world and one for the digital world.[28]

Courts have relied on the second clause, known as the "Transmit Clause," in cases involving the internet.[29] The Transmit Clause states "[t]o perform or display a work 'publicly' means . . . to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process . . . ."[30] Congress further defined "transmit" as "communicat[ing a display] by any device or process whereby images or sounds are received beyond the place from which they are sent."[31] Putting the two definitions together, the Transmit

[26] The Supreme Court grappled with this ambiguity in the context of the performance right. *See* Am. Broad. Cos., Inc. v. Aereo, Inc., 573 U.S. 431, 438–39 (2014) ("Considered alone, the language of the Act does not clearly indicate when an entity "perform[s]" (or "transmit[s]") and when it merely supplies equipment that allows others to do so.").

[27] 17 U.S.C. § 106(5). Courts only reach this inquiry if a party has already satisfied the definition of "display." *See id.*

[28] *See* 17 U.S.C. § 101 (providing two definitions for the public nature of a performance of display, which appear to apply to in-person and digital scenarios, respectively).

[29] *See Aereo*, 573 U.S. at 435–36 (defining the Transmit Clause as the right to "transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.") (citing 17 U.S.C. § 101).

[30] 17 U.S.C. § 101.

[31] *Id.*

Clause allows for two devices or processes to ultimately deliver the display to the public.[32] While the Transmit Clause sweeps broadly, when applied to the display right, it is limited by the definition of "display." Many activities may fall within the scope of the Transmit Clause, but only those that first satisfy the definition of "display" infringe the display right.

B. Legislative History

The Copyright Act is noteworthy because its lengthy legislative history[33] reveals that Congress itself did not draft much of the statutory language, as Professor Jessica Litman detailed in a seminal 1987 article.[34] Instead, Congress designed, funded, and supervised a series of negotiations between special interest groups—third parties with economic interests in copyright—to draft the statutory language.[35] This was by no means a simple delegation of lawmaking by members of Congress to interest groups; during the 21 years it took to enact a new copyright law, lawmakers "encouraged, cajoled, bullied, and threatened the parties through continuing negotiations[,]" helped the parties reach "viable compromises," and ultimately rejected amendments they felt would ruin the compromises.[36] Congress codified word-for-word several of the compromises between special interest groups.[37] Sometimes, the only explanation from Congress of the merits of the proffered provision was that it emerged from the

[32] For example, a version of the Transmit Clause that incorporates the definition of "transmit" reads as follows: To perform or display a copyrighted work "publicly" means to communicate a display of the work by any device or process whereby images or sounds are received beyond the place from which they are sent to the public, by means of any device or process. *See id.*

[33] Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 865 (1987) (detailing the reports, studies, hearings, and bills in the legislative history).

[34] *Id.* at 860–61.

[35] *Id.* at 861–62, 862 n.38.

[36] *Id.* at 871, 878.

[37] *Id.* at 869, 877.

compromise.[38] This makes relying on legislative history to interpret unclear provisions of the Act difficult because of the lack of a key assumption in such analyses: that the legislative history evinces the intent of members of Congress.[39]

Nonetheless, courts have continued to rely on legislative history in interpreting the display right, and so a brief overview is helpful.[40] Legislative history indicates the drafters of the Copyright Act were concerned with public digital transmissions.[41] On the display side, in granting copyright owners an additional right, a 1976 House report described it as recognizing the "exclusive right to show a copyrighted work, or an image of it, to the public."[42] The drafters elaborated that a display would include "the projection of an image on a screen or other surface by any method" or "the transmission of an image by electronic or other means."[43] But the legislative history explaining "display" illustrates a tension with the statutory text. While the statutory definition of "display" does not explicitly include transmissions—in contrast with the

[38] *Id.* at 878–79. Fair use provides an example. The statutory language is a "verbatim" translation of the compromise struck by the interest groups involved. *Id.* at 877. However, while the interest groups agreed on the compromise's language, they did not agree on the compromise's meaning. *Id.* That the interest groups agreed not to agree on the meaning of the language is striking, given how fair use represents one of just two ways for "interests that lacked the bargaining power to negotiate a specific exemption" to escape copyright liability. *Id.* at 886.

[39] *Id.* at 864–65.

[40] Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 589 (S.D.N.Y. 2018) (showing how the court turns to legislative history after laying out the statutory definitions). Professor Litman suggests courts comb through legislative history to unearth the meaning of the compromises struck by interest groups in seeking guidance on what provisions mean. Litman, *supra* note 33, at 903.

[41] Reese, *supra* note 21, at 92. Since the definition of "publicly" invokes the term "transmit," the legislative history appears to emphasize the term "publicly" in the display right. *See* 17 U.S.C. § 101.

[42] H.R. REP. NO. 94-1476, at 63 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5676. However, when Congress committed the right to text, it substituted the word "image" for one with statutory meaning, "copy." *See* 17 U.S.C. 101 (defining the term "display").

[43] H.R. REP. No. 94-1476, at 64.

drafters' decision to use the term "transmit" in the definition of "publicly"—legislative history explaining "display" appears to cover transmissions.[44]

On the public nature of the display, the 1976 House report emphasized that the concept of transmissions captured radio and television broadcasts, but was not limited to those forms of communications media.[45] The drafters appeared to envision a far-reaching right that would allow the copyright owner to sue to any party that subsequently transmitted its legally cognizable display to the public for infringement.[46] However, the drafters acknowledged their limited ability to forecast how this new exclusive right would develop, noting that "[t]he existence or extent of this right under the present statute is uncertain and subject to challenge."[47]

C. The Intellectual Property Clause

Congress derives its ability to create copyright law from the Intellectual Property Clause ("IP Clause") of the Constitution, which reads: "The Congress shall have Power . . . To promote

[44] *Compare id.*, *with* 17 U.S.C. § 106.

[45] H.R. REP. No. 94-1476, at 64. ("Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a 'transmission.'"). The various reports and hearings that make up the Copyright Act's legislative history repeatedly use the term "image" instead of "copy" when describing the display right. For example, in a 1965 hearing, the Register of Copyrights stated: "Under the bill this would be an infringement only if the image of the work is transmitted beyond the location of the computer in which the copy is stored." Reese, *supra* note 21, at 100. The Second Circuit, however, has questioned the relevance of legislative materials from the 1960s given the years that lapsed before the 1976 act passed. *See* Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 135 (2d Cir. 2008) ("We question how much deference this report [from 1967] deserves.").

[46] H.R. REP. No. 94-1476, at 63 ("[T]he concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public."). Professor Kimberlianne Podlas characterized the logic in the House report as circular, noting that the drafters effectively used the definition of "publicly" to define the term "display." Kimberlianne Podlas, *Linking to Liability: When Linking to Leaked Movies, Scripts, and Television Shows Is Copyright Infringement*, 6 HARV. J. SPORTS & ENT. L. 41, 55 (2015) ("Essentially, the Transmit Clause provides that one can perform or display by transmitting, or circularly, a transmission of a copyrighted work constitutes a performance or display of it.").

[47] H.R. REP. No. 94-1476, at 63.

the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[48] This is a limited grant of power.[49] The IP Clause gives Congress the power to create copyright laws giving owners exclusive rights only as far as the rights promote scientific progress.[50]

The Copyright Act fulfills this constitutional imperative by balancing authors' need for economic incentives with the public's need to access copyrighted works.[51] Congress rewards copyright owners for creative activity by giving them time-limited rights, which encourages them to continue working in ways that benefit the public.[52] But while economic incentives for authors are crucial in ultimately ensuring "the Progress of Science" through public consumption

[48] U.S. CONST. art. I, § 8, cl. 8; Allen v. Cooper, 140 S. Ct. 994, 1001 (2020) (calling clause 8 the Intellectual Property Clause).

[49] *See* W. Michael Schuster, *Public Choice Theory, the Constitution, and Public Understanding of the Copyright System*, 51 U.C. DAVIS L. REV. 2247, 2256–57 (2018) (describing the IP Clause's limiting nature in the subheading and text). The IP Clause is the only such grant of power thus limited by "a specific statement of legislative purpose." *Id.* at 2256.

[50] *See* Graham v. John Deere Co., 383 U.S. 1, 5 (1966) (explaining that the framers of the Constitution thus bestowed upon Congress a "qualified authority" to create patent laws only in the furtherance of promoting the progress of the useful arts). When translated to copyright laws, that means the Constitution only permits Congress to create laws to promote the progress of science, because the Constitutional text "Progress of Science" refers to Congress's copyright authority. *See* Schuster, *supra* note 49, at 2258; Golan v. Holder, 565 U.S. 302, 324 (2012) ("Perhaps counterintuitively for the contemporary reader, Congress' copyright authority is tied to the progress of science; its patent authority, to the progress of the useful arts.").

[51] R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 577 (2003) ("Copyright law is often viewed as a balance of providing authors with sufficient incentives to create their works and maximizing public access to those works."). The Supreme Court in 2012 determined that incentivizing the creation of works is not the only way for Congress to satisfy its Constitutional mandate to promote the progress of science, incentivizing dissemination of creative works also suffices. *Golan*, 565 U.S. at 327.

[52] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.'").

of copyrighted works, the incentives remain the means, not the ends, of copyright legislation.[53] This balancing underscores the American view that copyright is not a natural right that would grant the author absolute ownership of her copyrighted works, but rather a way to achieve a utilitarian goal of enriching the public by "permitting authors to reap the rewards of their creative efforts."[54]

Part II: Judicial Analysis of Embedding

The tension between embedding and the display right has intensified recently. For years, the Ninth Circuit's 2007 conclusion that embedding does not violate the display right served as the standard across the country.[55] A decade later, the Southern District of New York questioned the Ninth Circuit's logic and held that embedding violates the display right.[56] This part examines the reasons behind the conflicting decisions.

In *Perfect 10, Inc. v. Amazon.com, Inc.*, the plaintiff operated a website that allowed subscribers to view its copyrighted images of nude models.[57] Unfortunately, some websites republished Perfect 10's images without permission.[58] Perfect 10 alleged that defendant Google violated its display right when, in response to a user's query, Google presented the Perfect 10 images, hosted on the other websites, in its search results through embedding.[59]

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[53] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'").

[54] Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

[55] *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

[56] Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585 (S.D.N.Y. 2018).

[57] Perfect 10, 508 F.3d at 1157.

[58] *Id.*

[59] *See id.* Technically, the process at issue in *Perfect 10* was "in-line linking," but practitioners treat "in-line linking" and "embedding" interchangeably. *See* U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES 48 n.237 (2016), https://www.copyright.gov/docs/making_available/making-available-right.pdf ("[I]nline linking,

The Ninth Circuit began with the statutory text.[60] The Copyright Act defines "display," as relevant to the case, as showing a copy of a copyrighted work by means of a device or process.[61] The court determined that a legally cognizable display required the use of a copy and, based on case law, that a copy existed on a computer once saved or stored on the computer's server.[62] The court identified the owner of the computer containing a copy of the copyrighted work as the party who "displayed" for the purposes of the Copyright Act.[63] In particular, the computer owner showed a copy by means of a device or process when the computer owner "us[ed] the computer to fill the computer screen with the photographic image stored on that computer, or . . . communicat[ed] the stored image electronically to another person's computer."[64] Because embedding did not involve storing an image on a server, the Ninth Circuit held that embedding cannot "display" for the purposes of the Copyright Act.[65] This became known as the server test.[66]

The Ninth Circuit distinguished between a display, which shows a copy of a copyrighted work through a device or process, and embedding, which directs a website viewer's browser to interact with the computer that stores a copy of a copyrighted work.[67] The latter, the court argued, cannot cause a display without the participation of the computer that stores the copyrighted work, exposing the embedding party to at most contributory liability.[68] Because the

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or embedding, displays digital content within the linking website by serving it up from the original server, giving the impression that the content belongs to the linking website.").

[60] *Id.* at 1160.

[61] *Id.*

[62] *See id.*; *see also* MAI Sys. Corp. v. Peak Comput. Inc., 991 F.2d 511, 517–19 (9th Cir. 1993).

[63] *Perfect 10*, 508 F.3d at 1160.

[64] *Id.*

[65] *See id.*

[66] *Id.* at 1159.

[67] *Id.* at 1155, 1161.

[68] *Id.* at 1161.

court resolved the question of copyright infringement based on the definition of "display," it did not go on to further analyze the Transmit Clause in the body of the opinion. In a footnote, however, the Ninth Circuit dismissed the claim that embedding satisfied the definition of "publicly" because embedding transmitted an address, rather than a display of the work, as required by statute.[69]

The Southern District of New York scrutinized the Ninth Circuit's logic in *Goldman v. Breitbart News Network, LLC*. There, the copyrighted work was a photo belonging to plaintiff Justin Goldman, who spotted football player Tom Brady and others on the street and posted a photo of them to the social media platform Snapchat.[70] Social media users subsequently posted Goldman's photo to Twitter.[71] Goldman sued several news organizations after they embedded Twitter posts containing his photo in their articles about Tom Brady's efforts to help recruit basketball player Kevin Durant for the Boston Celtics. [72]

The court held that the defendant news organizations infringed the plaintiff's display right by embedding.[73] It emphasized that the statutory definitions of "display" and "publicly" could both involve processes and found that the process of embedding satisfied both definitions because it "resulted in a transmission of the photos so that they could be visibly shown."[74] In reaching its holding, the court relied on excerpts from the Copyright Act's legislative history

[69] *Id.* at 1161 n.7 ("Google's activities do not meet this definition [of "publicly"] because Google transmits or communicates only an address which directs a user's browser to the location where a copy of the full-size image is displayed.").

[70] Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 586 (S.D.N.Y. 2018).

[71] *Id.* at 587.

[72] *Id.* at 586–87.

[73] *Id.* at 586.

[74] *Id.* at 588–89, 594 ("[E]ach and every defendant itself took active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown . . . The plain language of the Copyright Act calls for no more.").

describing various actions that would violate the display right that appeared to capture embedding. For example, the court quoted a House report stating that a "display" under the Copyright Act would include "the projection of an image on a screen . . . by any method,"[75] and that a display would qualify as public, and infringing, "if the image were transmitted by any method (. . . for example, by a computer system) from one place to members of the public elsewhere."[76] After analyzing the statutory text, it rejected the Ninth Circuit's gloss that "possession of an image is necessary in order to display it."[77]

Part III: Statutory Interpretation that Acknowledges Special Interests

The unique drafting process that created the Copyright Act requires a different approach to statutory interpretation. This part argues that courts should interpret the display right in a way that achieves copyright law's constitutional mandate to "promote the Progress of Science . . . ."[78] In other words, this part advocates for courts to emphasize the public interest where, as here, special interest groups representing copyright owners had an outsized influence in drafting the law. First, it highlights two theories of statutory interpretation that account for the influence of special interest groups in crafting copyright law. Second, it examines the need for a rule of lenity in analyzing potential violations of the display right. Finally, it applies the proposed rule of lenity to the issue of embedding.

[75] *Id.* at 589.
[76] *Id.* at 594.
[77] *Id.* at 593.
[78] U.S. CONST. art. I, § 8, cl. 8.

A. Theories of Statutory Interpretation

Despite the constitutional underpinnings of American copyright law, the Supreme Court has proved reluctant to invalidate copyright law on constitutional grounds.[79] Given that dynamic, scholars have proposed various theories of statutory interpretation that account for the influence of special interests in copyright law. For example, Professor Christina Bohannan has examined statutory ambiguities that exist when private-interest provisions, like the exclusive right to prepare derivative works, conflict with public-interest provisions, like the fair use defense that seemingly allows for derivative works.[80] Under her theory, copyright infringement claims arising from statutory ambiguities should fail.[81] If applied by courts, Professor Bohannan's rule of narrow construction would guide them to interpret statutory ambiguities against the special interest groups that bargained among themselves for the statute's provisions.[82] Such a presumption against the special interest groups properly emphasizes copyright law's constitutional statement of purpose—"To promote the Progress of Science"[83]—that serves as a strong indicator of legislative meaning because it empowers Congress to create copyright laws.[84]

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[79] Christina Bohannan, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 568 (2006) (describing the Court's decision in *Eldred v. Ashcroft* as involving a constitutional issue, which "rarely" leads to the striking down of intellectual property laws).

[80] *Id.* at 594. The Copyright Act gives copyright owners the exclusive right "to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(2). The statute further defines "derivative work" as including a work that has been transformed. 17 U.S.C. § 101. At the same time, the Copyright Act provides that certain "fair" uses of copyrighted works do not infringe and lays out a four-factor test for determining when a use is "fair." 17 U.S.C. § 107. Professor Bohannan argues that the right to prepare derivative works cannot exist alongside the first fair use factor—the purpose and character of the use—because courts have interpreted this factor as inquiring into whether the defendant's work is transformative. Bohannan, *supra* note 79, at 595 (explaining how a transformative use is compelling evidence for a finding of fair use).

[81] *See id.* at 633–34.

[82] *Id.* at 614–617.

[83] U.S. CONST. art. I, § 8, cl. 8.

[84] *See* Bohannan, *supra* note 79, at 617.

In a similar vein, Professor Sepehr Shahshahani has argued that courts, including the Supreme Court, should adopt a "copyright rule of lenity" in which they presume no copyright infringement exists when the law is ambiguous as it relates to claims against new technologies.[85] His proposed presumption arose from a game theory model that recognized the influence of resource-rich special interest groups in creating copyright legislation.[86] By resolving ambiguities in favor of the party lacking resources, Professor Shahshahani argued that courts would establish a more equitable baseline that should improve the prospects for legislative compromise.[87] In contrast, a finding of infringement against the party lacking resources would likely drive the party out of business, preventing it from participating in the legislative process.[88] Ultimately, this model emphasized that judicial rulings are but an intermediate step in the copyright policy making process; these rulings form the basis from which Congress, influenced by lobbying, revises and creates the final policy.[89]

B. The Case for a Rule of Lenity

Courts often interpret ambiguous statutory language by looking to the statute's purpose.[90] The judicial search for statutory purpose occurs in copyright law because the Copyright Act

[85] Sepehr Shahshahani, *The Role of Courts in Technology Policy*, 61 J.L. & ECON. 37, 57 (2018).

[86] *Id.* at 38–40, 56–57.

[87] *Id.* at 57.

[88] *Id.* Take the example of Aereo. *See* Am. Broad. Cos., Inc. v. Aereo, Inc., 573 U.S. 431 (2014). After the Supreme Court held that its service violated the petitioners' performance rights, Aereo shut down—"suspend[ing] operations a few days after the Court's decision." Shahshahani, *supra* note 85, at 55. It has not since been able to successfully lobby Congress. *Id.*

[89] *Id.* at 38.

[90] The Supreme Court relied on statutory purpose in 2014 when deciding whether a streaming television service violated the performance right. *Aereo*, 573 U.S. at 450 ("We also note that courts often apply a statute's highly general language in light of the statute's basic purposes.")

provides brief but expansive rights that trigger overlapping definitions.[91] Because the display right debuted in the latest version of the Copyright Act, district courts cannot glean purpose by looking at how the right changed over time, a technique the Supreme Court has employed regularly.[92] Instead, district courts interpreting the display right have relied on legislative history to divine the statute's purpose, which typically results in an expansive interpretation of the exclusive right.[93]

This Note argues that judicial reliance on legislative history when interpreting the display right is improper given the unusual role special interest groups played in drafting the Copyright Act.[94] Within the context of this statute only, deferring to legislative history where the statutory text is ambiguous or silent effectively hands more power to the special interest groups that dominated the statutory drafting process of the Copyright Act, at the expense of members of the public. Instead, this Note advocates applying a rule of lenity when the statutory text of the display right does not resolve a question presented to the courts, as the text fails to do when considering *who* sufficiently displays a copyrighted work.[95] Therefore, when considering whether an embedding party violates a copyright owner's display right, this rule of lenity prevents courts from finding copyright infringement.

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[91] *See supra* Part I.A.

[92] *See, e.g.*, *Aereo*, 573 U.S. at 441 (explaining that previous Supreme Court holdings construing the performance right provided one motivation for the updated Copyright Act in 1976); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 354–55 (1991) (noting how the drafters of the Copyright Act of 1976 changed its language to make the originality requirement explicit, responding to "sweat of the brow" decisions).

[93] *See, e.g.*, Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552, 1556–57 (M.D. Fla. 1993).

[94] *See supra* Part I.B.

[95] Courts interpreting the display right in cases involving the liability of internet providers in the 1990s similarly grappled with the concept of *who* displayed a work in question. See, e.g., Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, PAGE (N.D. Cal. 1995).

This Note combines and adapts theories of statutory interpretation that guide courts to counterbalance the influence of special interest groups in American copyright law.[96] The proposed rule of lenity, which institutes a presumption against copyright infringement,[97] accounts for the fact that special interest groups are likely to continue lobbying for stronger copyright protections while the public's interest in accessing a work is likely to remain less influential or represented by groups with varied interests.[98] That this dynamic has resulted in the strengthening of copyright laws over the past fifty years underscores that interest groups seeking stronger protections are able to effectively communicate their concerns to policy makers when they consider judicial decisions unfair.[99] Indeed, construing ambiguities in a statute against its drafter—here, special interest groups—comports with contract theory.[100]

Not only has the influence of special interest groups strengthened copyright protections, but it has also narrowed the public's protections to two: the fair use doctrine—a costly and troublesome defense—and the fact/idea dichotomy.[101] A presumption against copyright

[96] This Note draws on the scholarship of Professor Bohannan and Professor Shahshahani. *See* discussion *supra* Part III.A.

[97] Professor Shahshahani called this theory a "copyright rule of lenity," *see supra* note 85 and accompanying text. Professor Bohannan's theory of statutory interpretation invokes a presumption against infringement, *see* Bohannan, *supra* note 79, at 613–14.

[98] To be sure, the public has been able to organize and assert its views. Groups advocating for public use in copyright issues like the Electronic Frontier Foundation and Public Knowledge have emerged and grown in the years since the Copyright Act passed. Timothy B. Lee, *Why Mickey Mouse's 1998 copyright extension probably won't happen again*, ARS TECHNICA (Jan. 8, 2018, 8:00 AM), https://arstechnica.com/tech-policy/2018/01/hollywood-says-its-not-planning-another-copyright-extension-push/.

[99] In discussing copyright revision in 2013, the Register of Copyrights described Congress's key challenge as "keeping the public interest in the forefront of its thoughts, including how to define the public interest and who may speak for it." Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 339 (2013).

[100] Professor Bohannan made this observation in justifying her presumption against infringement. Bohannan, *supra* note 79, at 614.

[101] Fair use and the fact/idea dichotomy are the only major limits on the copyright owner's monopoly on her works and courts must consider them as "fundamental" policies of

infringement within the display right will help level the playing field, which could lead to better legislative compromises between a more diverse group of parties, including those representing the public interest.[102] Viewed this way, the rule of lenity does not create final copyright policy.[103] Instead, this rule honors the Supreme Court's recognition that Congress, not the courts, should decide how to balance the incentives for authors with the benefit to the public that the Constitution requires.[104]

C. The Rule of Lenity Applied to Embedding

The text of the Copyright Act gives a copyright owner the exclusive right to display her work publicly, rendering parties liable when they engage in unauthorized public displays.[105] As it relates to embedding, an act of display involves showing a copy of a copyrighted work by means of a process.[106] But the statutory text does not explain how to determine *who* has shown the copy when multiple parties are involved. Has the embedding party shown the copy, or has the party that posted the copyrighted work to the internet shown the copy? Because the Supreme Court has construed copyright law as recognizing both direct and secondary liability for infringement, this distinction is critical.[107] Thus, the statutory text reveals an ambiguity with respect to the display right.

American copyright law. *See* Leval, *supra* note 54, at 1135–36. And these limits are not perfect. The fair use affirmative defense is an "intimidating and expensive undertaking"—one that parties often seek to avoid. *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 889 n.12 (2007).

[102] Shahshahani, *supra* note 85, at 57.

[103] *Id.* at 38.

[104] *See e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 212 (2003); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

[105] *See* 17 U.S.C. § 106(5).

[106] *See* 17 U.S.C. § 101 (defining "display").

[107] While the text of the Copyright Act "does not expressly render anyone liable for infringement committed by another," the Court in *Sony v. Universal City Studios* did not consider that absence of express language dispositive. *See* 464 U.S. at 434–35. Just over 20 years

The Copyright Act's drafting process—negotiations between special interest groups—counsels against relying on legislative history to discern Congressional intent when faced with unclear statutory text, as many courts have done.[108] Indeed, Congressional intent may not have emerged even when members of Congress reviewed the interest groups' drafts of copyright revisions, because "even the sponsors of copyright revision demonstrated little knowledge and few opinions about the substance of the bills they introduced[.]"[109]

Applying a rule of lenity to the embedding context creates a bright-line rule—subject to rebuttal by Congress—that a party who embeds a copyrighted work has not violated the copyright owner's display right. Instead, the party who placed the photo on the internet has displayed it and may face liability for copyright infringement. And because a party's ability to post a photo online requires the use of a copy, the Server Test fits with the rule of lenity: a party can only post a photo over which she has control, which means the copy must exist on her computer's server.[110]

In contrast, when faced with the display right's statutory ambiguity, the *Goldman* court attached liability to *any* party that took actions resembling those mentioned in the Copyright Act's legislative history, such as projecting an image on a screen by any method.[111] The court found that embedding satisfied the statutory definitions of "display" and "publicly" because the

later, the Court characterized the doctrines of secondary liability as well-established, coming from common law. *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005). Even Justice Scalia treated the existence of the direct and secondary liability for copyright infringement as given despite its absence from the text of the statute. *See* Am. Broad. Cos., Inc. v. Aereo, Inc., 573 U.S. 431, 452 (2014) (Scalia, J., dissenting).

[108] *See supra* Part I.B.

[109] Litman, *supra* note 33, at 865.

[110] *See* Lee Burgunder & Barry Floyd, *The Future of Inline Web Designing After Perfect 10*, 17 TEX. INTELL. PROP. L.J. 1, 22 (2008).

[111] Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 589 (S.D.N.Y. 2018).

embedding parties "took active steps" by including the embed codes for the copyrighted work in their webpage design—in other words, used processes—that ultimately transmitted the work to the public.[112] The court's logic creates a slippery slope that would ensnare all forms of linking[113]—not just embedding—that make the internet so powerful.[114] This approach would treat the steps used to create surface links, which allow users to navigate to the linked content by clicking, in the same way as the steps used to create embedded links. Thus, a party that includes a surface link to another website containing infringing content would face copyright infringement liability.[115] If followed to its logical conclusion, this would imperil a critical component of the internet: references by linking.[116]

Public policy also supports excluding embedding from copyright infringement liability. The news industry offers one example. News publishers frequently embed social media posts containing images in online articles as they seek to inform readers about current developments.[117] The importance of referencing social media in news articles, regardless of whether it is accomplished by embedding, has grown as politicians and policy makers take directly to social media platforms to communicate their views.[118] During breaking news events,

[112] *See id.* at 594 ("It is clear, therefore, that each and every defendant itself took active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown.").

[113] Lian, *supra* note 21, at 248 ("If an embedded Tweet constitutes a process, is simple linking also part of the 'process' that may implicate the display and performance rights?").

[114] Strowel & Ide, *supra* note 5, at 404 ("The practice of linking web pages to others helps users, by means of successive references, to find the information that they are seeking, thus overcoming the difficulty of the incredible dissemination of information available on the Web.").

[115] *See id.* at 407–09 (summarizing the various forms of linking).

[116] *See id.* at 404.

[117] Ginsburg & Budiardjo, *supra* note 9, at 422 n.22.

[118] *How Social Media Is Shaping Political Campaigns*, THE WHARTON SCHOOL OF THE UNIVERSITY OF PENNSYLVANIA: KNOWLEDGE@WHARTON (Aug. 17, 2020), https://knowledge.wharton.upenn.edu/article/how-social-media-is-shaping-political-campaigns/.

like demonstrations or natural disasters, bystander footage posted to public social media platforms provides valuable information for the public.[119] The Copyright Act itself recognizes the importance of news reporting, albeit in the preamble to the fair use defense to copyright infringement rather than in a straightforward exception to the exclusive rights.[120]

Embedding—like other types of linking that are so crucial to the functioning of the internet—helps achieve copyright law's constitutional mandate to "promote the Progress of Science."[121] Embedding aids the dissemination of information by highlighting content that a party has already posted publicly. As the California district court explained in *Perfect 10*, its adoption of the Server Test and finding of no infringement attempted to maintain "the delicate balance for which copyright law strives—i.e., between encouraging the creation of creative works and encouraging the dissemination of information."[122]

[119] *See supra* text accompanying note 1.
[120] *See* 17 U.S.C. § 107.
[121] U.S. CONST. art. I, § 8, cl. 8
[122] Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 844 (C.D. Cal. 2006), *aff'd in part, rev'd in part sub nom*. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

Applicant Details

First Name	**Seema**
Last Name	**Vithlani**
Citizenship Status	**U. S. Citizen**
Email Address	**skv269@nyu.edu**
Address	**Address** Street **23-01 41st Avenue, Apt. 6D** City **Long Island City** State/Territory **New York** Zip **11101** Country **United States**
Contact Phone Number	**4103006904**

Applicant Education

BA/BS From	**University of Maryland-College Park**
Date of BA/BS	**December 2016**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 20, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of International Law and Politics**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Williams, Andrew
andrew.williams@nyu.edu
(212) 998-6044
Munneke, Michelle
MUNNEKEM@brooklynda.org
Murphy, Erin
erin.murphy@nyu.edu
(212) 998-6672

This applicant has certified that all data entered in this profile and any application documents are true and correct.

23-01 41st Avenue Apt. 6D
Long Island City, NY 11101
410-300-6994 | seemavithlani12@gmail.com

March 21, 2022

Dear Judge Liman:

I am a graduate of New York University School of Law and am currently working in the litigation department of Covington & Burling LLP's New York office. I am applying to serve as your law clerk for the 2024-2025 term.

While at NYU Law, I served as an extern for Judge Alison Nathan in the Southern District of New York, and I worked in internship roles for three state and federal prosecutorial offices in New York. I also assisted victims of domestic violence in obtaining temporary orders of protection in family court, and I served as a teaching assistant for Professor Emma Kaufman's Legislation and the Regulatory State course. Finally, I was the treasurer of the South Asian Law Students' Association, in which role I prepared the funding request for the club's annual budget and assisted in organizing social and cultural events.

Enclosed are my resume, law school transcript, writing sample, and three letters of recommendation. My writing sample is a research memorandum that I prepared during my time at the King's County District Attorney's Office and that conforms to New York's citation style. The memorandum assesses whether the office could successfully prosecute a defendant for damaging or destroying property under New York's criminal mischief statute where the defendant has an interest in the property.

My recommenders are Michelle Munneke, Professor Erin Murphy, and Professor Andrew Williams. Michelle Munneke is an assistant district attorney at the King's County District Attorney's Office. I worked closely with Michelle to draft a successful motion for leave to reargue contending that police had probable cause to arrest a defendant and that blood alcohol content test results obtained by the police were admissible. Professor Murphy is currently on leave from NYU Law to complete a one-year term as a senior policy advisor for criminal justice for the White House Domestic Policy Council. Professor Murphy taught both my Criminal Law and Evidence courses. Finally, Professor Williams is the director NYU Law's Lawyering Program, a year-long legal writing and research program, and he was my Lawyering professor.

Thank you for your time and consideration.

Sincerely,

Seema Vithlani

SEEMA VITHLANI

23-01 41st Avenue Apt. 6D Long Island City, NY 11101 | 410-300-6994 | seemavithlani12@gmail.com

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
J.D., *magna cum laude,* Order of the Coif, May 2021
Activities: *NYU Journal of International Law and Politics,* Symposium and Staff Editor
Teaching Assistant for Professor Emma Kaufman (Administrative Law)
Domestic Violence Advocacy Project, Coordinator and Courtroom Advocate
South Asian Law Students Association, Treasurer and Member
Women of Color Collective and Law Women, Member

UNIVERSITY OF MARYLAND, PHILIP MERRILL COLLEGE OF JOURNALISM, College Park, MD
B.A. in Multiplatform Journalism with a minor in French Language, *cum laude*, December 2016
Activities: Legal Writing class: Undergraduate Teaching Assistant ▪ The Diamondback (student newspaper): Copy Editor ▪ Plex (student publication focused on minority news): Regional News Editor ▪ Election Watch (publication reporting on media coverage of 2016 election): Writer

EXPERIENCE

COVINGTON & BURLING LLP, Manhattan, NY
Law Clerk, October 2021 – Present; *Summer Associate*, June 2020 – July 2020
Assisting in an internal investigation into allegations of sexual and other misconduct at an organization, including researching privilege-related challenges. Drafting a brief to petition the Board for Correction of Naval Records for an upgrade in a military veteran's discharge characterization. Drafted part of a sentencing brief in a federal money laundering case. Conducted legal research on topics such as federal price-gouging prosecutions, causation in a tort action, legal challenges in connection with the #MeToo movement, and the validity of a patent claim.

JUDGE ALISON NATHAN, DISTRICT JUDGE IN THE SOUTHERN DISTRICT OF NEW YORK, Manhattan, NY
Federal Judicial Extern, September 2020 – December 2020
Wrote drafts of judicial opinions in response to a motion for reconsideration, a default judgment motion, several *Daubert* motions to exclude evidence, a motion to recuse, and other motions. Wrote research memoranda, including on jurisdictional issues with respect to the Mandamus Act and the Administrative Procedure Act.

KINGS COUNTY DISTRICT ATTORNEY'S OFFICE, Brooklyn, NY
Law Extern, January 2020 – May 2020
Drafted a successful motion to re-argue asserting there was probable cause to arrest. Offered a plea deal on the record. Drafted the line of questioning for a hearing on the propriety of a photo array identification procedure. Spoke directly with victims. Researched and wrote the opposition to a defense motion to sever, several motions to consolidate, and legal memoranda on issues such as the use of abandoned DNA samples from closed cases.

U.S. ATTORNEY'S OFFICE FOR THE EASTERN DISTRICT OF NEW YORK, Brooklyn, NY
Law Extern, General Crimes and National Security and Cybercrime Sections, September 2019 – December 2019
Drafted responses to *habeas corpus* petitions, a response to a motion *in limine*, and a search warrant application. Conducted legal research, including on a *Bruton* issue and on the First Step Act. Observed witness preparation, plea allocutions, a suppression hearing, and other proceedings. Participated in meetings with law enforcement.

QUEENS DISTRICT ATTORNEY'S OFFICE, Queens, NY
Law Intern, Economic & Environmental Crimes Bureau, June 2019 – August 2019
Drafted a plea offer, a motion *in limine* regarding an excited utterance, several search warrant applications, and research memoranda in a number of cases involving financial crimes and arson. Participated in meetings with law enforcement as well as in defendant and witness proffers. Observed different aspects of various criminal trials.

NASA GODDARD SPACE FLIGHT CENTER, Greenbelt, MD
Technical Publications Specialist, *ASRC Federal Contractor*, February 2017 – August 2018
Wrote news articles and press releases. Served as lead writer, editor, and designer for a quarterly newsletter with 400 direct recipients. Created technical presentations on behalf of division leaders. Co-authored technical papers for international journals. Coordinated events for visiting dignitaries and foreign government representatives.

Name: **Seema K Vithlani**
Print Date: **11/02/2021**
Student ID: **N17873217**
Institution ID: **002785**
Page: **1 of 2**

New York University
Beginning of School of Law Record

Degrees Awarded

Juris Doctor 05/19/2021
School of Law
Honors: magna cum laude
Major: Law
Order of the Coif

Fall 2018

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Andrew Wade Williams			
Torts	LAW-LW 11275	4.0	A-
Instructor: Catherine M Sharkey			
Procedure	LAW-LW 11650	5.0	B+
Instructor: Troy A McKenzie			
Contracts	LAW-LW 11672	4.0	A-
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: New York City Politics			
Instructor: Katrina M Wyman			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Andrew Wade Williams			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A
Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	A-
Instructor: Erin Murphy			
International Law	LAW-LW 11577	4.0	A-
Instructor: Jose E Alvarez			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: New York City Politics			
Instructor: Katrina M Wyman			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2019

School of Law
Juris Doctor
Major: Law

Prosecution Externship - Eastern District	LAW-LW 10103	3.0	CR
Instructor: Jacquelyn M Kasulis Alixandra Smith			
Prosecution Externship - Eastern District Seminar	LAW-LW 10355	2.0	A
Instructor: Jacquelyn M Kasulis Alixandra Smith			
Evidence	LAW-LW 11607	4.0	A
Instructor: Erin Murphy			
Property	LAW-LW 11783	4.0	A
Instructor: Frank K Upham			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2020

School of Law
Juris Doctor
Major: Law

--
Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
--

Criminal Procedure Survey	LAW-LW 10436	4.0	CR
Instructor: Andrew Weissmann			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Emma M Kaufman			
Constitutional Law	LAW-LW 11702	4.0	CR
Instructor: Deborah C Malamud			
Local Prosecution Externship	LAW-LW 12452	3.0	CR
Instructor: Anne M Milgram Evan Sean Krutoy			
Local Prosecution Externship Seminar	LAW-LW 12453	2.0	CR
Instructor: Anne M Milgram Evan Sean Krutoy			
Directed Research Option B	LAW-LW 12638	1.0	CR
Instructor: Frank K Upham			

	AHRS	EHRS
Current	16.0	16.0
Cumulative	59.0	59.0

Allen Scholar-top 10% of students in the class after four semesters

Fall 2020

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	5.0	A
Instructor: Jennifer Hall Arlen			
Ethics in Government: Investigation and Enforcement	LAW-LW 12211	2.0	B+
Instructor: Ellen N Biben Linda Lacewell			
Federal Judicial Practice Externship	LAW-LW 12448	3.0	CR
Instructor: Michelle Beth Cherande Alison J Nathan			
Federal Judicial Practice Externship Seminar	LAW-LW 12450	2.0	CR
Instructor: Michelle Beth Cherande Alison J Nathan			
Class Actions Seminar	LAW-LW 12721	2.0	B+
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	73.0	73.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Free Speech	LAW-LW 10668	3.0	B+
Instructor: Amy M Adler			
Journal of International Law & Politics	LAW-LW 10935	1.0	CR
Survey of Intellectual Property	LAW-LW 10977	4.0	A-
Instructor: Barton C Beebe			
Regulation of Foreign Corrupt Practices	LAW-LW 12081	2.0	A-
Instructor: Kevin E Davis			
The Elements of Criminal Justice Seminar	LAW-LW 12632	2.0	A

Name:	**Seema K Vithlani**
Print Date:	**11/02/2021**
Student ID:	**N17873217**
Institution ID:	**002785**
Page:	**2 of 2**

Instructor: Preet Bharara

	AHRS	EHRS
Current	12.0	12.0
Cumulative	85.0	85.0

Staff Editor - Journal of International Law & Politics 2019-2020
Symposium Editor - Journal of International Law & Politics 2020-2021

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD & LLM STUDENTS

I certify that the above is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

The following guidelines, adopted in Fall 2008, represent NYU School of Law's current guidelines for the distribution of grades in a single course. Note that JD and LLM students take classes together and the entire class is graded on the same scale.

A+ = 0-2%	**A** = 7-13%	**A-** = 16-24%
B+ = 22-30%	**B** = Remainder	**B-** = 0-8% for 1L JD students; 4-11% for all other students
C/D/F = 0-5%	**CR** = Credit	**IP** = In Progress
EXC = Excused	**FAB** = Fail/Absence	**FX** = Failure for cheating
*** = Grade not yet submitted by faculty member		
Maximum for A tier = 31%; Maximum grades above B = 57%		

The guidelines for first-year JD courses are mandatory and binding on faculty members. In all other cases, they are advisory but strongly encouraged. These guidelines do not apply to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students taking the course for a letter grade.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, or to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process for all NYU School of Law students is highly selective and seeks to enroll individuals of exceptional ability. The Committee on Admissions selects those candidates it considers to have the very strongest combination of qualifications and the very greatest potential to contribute to the NYU School of Law community and the legal profession. The Committee bases its decisions on intellectual potential, academic achievement, character, community involvement, and work experience. For the Class entering in Fall 2020 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 172/167 and 3.9/3.7. Because of the breadth of the backgrounds of LLM students and the fact that foreign-trained LLM students do not take the LSAT, their admission is based on their prior legal academic performance together with the other criteria described above.

UNOFFICIAL TRANSCRIPT
FOR ADVISING PURPOSES ONLY
As of: 03/21/18

Vithlani, Seema
E-Mail: svithlan@terpmail.umd.edu
Major: Journalism: Multi-Platform Journali
Transfer - From 2-Year Institution Undergraduate Degree Seeking
GenEd Program Current Status: Registered Fall 2016
Minor: FRENCH STUDIES

Fundamental Requirement Satisfied Math: Transfer; English: Transfer

Transcripts received from the following institutions:

Advanced Placement Exam on 07/16/13

Howard Community College on 11/01/12

** Transfer Credit Information **			** Equivalences **	
Advanced Placement Exam				
1101 U.S. GVPT/SCR 4	P	3.00	GVPT170	DSHS
1201 ENG LANG/COMP/SCR 5	P	3.00	ENGL101	FSAW
CALCULUS AB/SCR 5	P	4.00	MATH140	FSAR, FSMA
1301 ENG LIT/COMP/SCR 5	P	6.00	ENGL240	
FRENCH LANG/SCR 5	P	6.00	FREN204	
			FREN211	
PSYCHOLOGY/SCR 5	P	3.00	PSYC100	DSHS or DSNS
STATISTICS/SCR 4	P	3.00	STAT100	FSAR, FSMA
Acceptable UG Inst. Credits:		**28.00**		
Applicable UG Inst. Credits:		**28.00**		
Howard Community College				
1205 ELEM HINDI I	A	4.00		DSHU
		Footnotes: MH 17		
Acceptable UG Inst. Credits:		**4.00**		
Applicable UG Inst. Credits:		**4.00**		
Total UG Credits Acceptable:		**32.00**		
Total UG Credits Applicable:		**32.00**		

Historic Course Information is listed in the order:
Course, Title, Grade, Credits Attempted, Earned and Quality Points

Fall 2013
MAJOR: JOURNALISM COLLEGE: MERRILL COLLEGE OF JOURNALISM

COMM107	ORAL COMM PRIN	A	3.00	3.00	12.00	FSOC
FREN250	INTRO CLTRL&TEXT ANLYSIS	A	3.00	3.00	12.00	DSHU
HIST201	AM HIST 1865 TO PRESENT	B+	3.00	3.00	9.90	DSHS or DSHU, DVUP
JOUR200U	HIST,ROLES & STRUCTURES	A	3.00	3.00	12.00	

PSYC289E PSYCHOLOGY OF EVIL A+ 3.00 3.00 12.00 DSHS or DSSP, SCIS
**** Semester Academic Honors ****
Semester: Attempted 15.00; Earned 15.00; GPA 3.860
UG Cumulative: 15.00; 15.00; 3.860

Spring 2014
MAJOR: JOURNALISM COLLEGE: MERRILL COLLEGE OF JOURNALISM
ECON200 PRIN MICRO-ECONOMICS B+ 4.00 4.00 13.20 DSHS
FREN301 COMPOSITION & STYLE B+ 3.00 3.00 9.90
GVPT200 INTERN POLI RELATIONS A 3.00 3.00 12.00 DSHS, DVUP
HIST289L CRIME & PUNISHMENT A 3.00 3.00 12.00 DSHS, SCIS
JOUR201 NEWS WRTNG & REPORTING I B+ 3.00 3.00 9.90
**** Semester Academic Honors ****
Semester: Attempted 16.00; Earned 16.00; GPA 3.562
UG Cumulative: 31.00; 31.00; 3.706

Fall 2014
MAJOR: JOURNALISM COLLEGE: MERRILL COLLEGE OF JOURNALISM
ASTR101 GENERAL ASTRO A- 4.00 4.00 14.80 DSNL
BSST334 STATES OF EMERGENCY A- 3.00 3.00 11.10 DSHS, SCIS
GVPT331 LAW & SOCIETY A+ 3.00 3.00 12.00
ITAL103 INTENSIVE ELEM ITAL A+ 4.00 4.00 16.00
JOUR320 MULTIPLATFORM REPORTING A- 3.00 3.00 11.10
**** Semester Academic Honors ****
Semester: Attempted 17.00; Earned 17.00; GPA 3.823
UG Cumulative: 48.00; 48.00; 3.747

Winter 2015
MAJOR: JOURNALISM COLLEGE: MERRILL COLLEGE OF JOURNALISM
BSCI339M MAYAN CLTR & CORAL REEFS A 3.00 3.00 12.00
STUDY IN BELIZE
Semester: Attempted 3.00; Earned 3.00; GPA 4.000
UG Cumulative: 51.00; 51.00; 3.762

Spring 2015
MAJOR: JOURNALISM COLLEGE: MERRILL COLLEGE OF JOURNALISM
Minor: FRENCH STUDIES
CLAS170 GREEK & ROMAN MYTHOLOGY A 3.00 3.00 12.00 DSHU
FREN311 ADV ORAL EXPRESSION A 3.00 3.00 12.00
JOUR202 NEWS EDITING B+ 3.00 3.00 9.90
JOUR203 INTRO MULTIMEDIA SKILLS A- 3.00 3.00 11.10
JOUR300 JOURNALISM ETHICS A 3.00 3.00 12.00
**** Semester Academic Honors ****
Semester: Attempted 15.00; Earned 15.00; GPA 3.800
UG Cumulative: 66.00; 66.00; 3.771

Fall 2015
MAJOR: JOURNALISM COLLEGE: MERRILL COLLEGE OF JOURNALISM
Minor: FRENCH STUDIES
BMGT230 BUSINESS STATISTICS A+ 3.00 3.00 12.00 FSAR
ENGL392 LEGAL WRITING A 3.00 3.00 12.00 FSPW
FREN303 TRANSLATION: ENG TO FREN A- 3.00 3.00 11.10
JOUR352 INT MULTIMEDIA JOUR A 3.00 3.00 12.00
JOUR400 MEDIA LAW A+ 3.00 3.00 12.00

**** Semester Academic Honors ****
Semester: Attempted 15.00; Earned 15.00; GPA 3.940
UG Cumulative: 81.00; 81.00; 3.802

Spring 2016
MAJOR: JOURNALISM COLLEGE: MERRILL COLLEGE OF JOURNALISM
Minor: FRENCH STUDIES

EDUC388T	GUID EXPR COL TCHG	A	3.00	3.00	12.00	DSSP
EDUC498	SELECT TOPICS IN EDUC	A+	1.00	1.00	4.00	
FREN352	EPIC TO ENLIGHTENMENT	A	3.00	3.00	12.00	
JOUR324	COMNTRY & EDTORIAL WRTNG	A	3.00	3.00	12.00	
JOUR354	INTERACTIVE MULTIMEDIA	A-	3.00	3.00	11.10	
JOUR396	SUPERVISED INTERNSHIP	A+	2.00	2.00	8.00	
JOUR479K	BUILDING SYSTEMS REPORT	A	3.00	3.00	12.00	

**** Semester Academic Honors ****
Semester: Attempted 18.00; Earned 18.00; GPA 3.950
UG Cumulative: 99.00; 99.00; 3.829

Fall 2016
MAJOR: JOURNALISM COLLEGE: MERRILL COLLEGE OF JOURNALISM
Minor: FRENCH STUDIES

ARAB104	ELEM MOD STAND ARAB I-II	A	6.00	6.00	24.00	
ENGL388V	UG TAS IN WRITING PROGS	A	1.00	1.00	4.00	DSSP
FREN459F	FEMMES FATALES	A-	3.00	3.00	11.10	
JOUR368E	ELECTION 2016	A+	3.00	3.00	12.00	
JOUR459P	IMPACT 9/11 JOUR & LIFE	A	3.00	3.00	12.00	
JOUR480	CAPSTONE BUS. OF NEWS	A	1.00	1.00	4.00	

**** Semester Academic Honors ****
Semester: Attempted 17.00; Earned 17.00; GPA 3.947
UG Cumulative: 116.00; 116.00; 3.846

**** Degree Information ****
PHILIP MERRILL COLLEGE OF JOURNALISM
Bachelor of Arts
Awarded 12/20/16
Cum Laude
JOURNALISM
Minor: FRENCH STUDIES

UG Cumulative Credit: 148.00
UG Cumulative GPA : 3.846

March 15, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write in unreserved support of Seema Vithlani's application for a judicial clerkship and give her candidacy my strongest possible recommendation.

Seema was my student in Lawyering during her first year. The Lawyering Program is an ungraded, yearlong course that encompasses legal research and writing, witness and client interviewing, client counseling, mediation, negotiation, and oral argument. Through simulations, we incorporate formal and informal approaches to advocacy and analysis. Students work individually and within small groups, and they meet regularly in critique sessions for feedback from the professor and their peers. Seema's class had 15 students, and I was able to spend significant time with each student.

During that time, I observed Seema's legal research and writing, interactions with peers and simulated clients, work with fact development, and overall analytical ability. Seema was one of my top students by any measure.

The motivation for learning and improvement in an ungraded simulation course must come from the student. To be among the top students in such a course requires precise writing and sharp analytical skills but also dedication, professionalism, a willingness to grow from feedback, and an ability to work collaboratively with others. Seema excelled at the fundamental lawyering skills as well as the professional contexts in which they operate. She showed excellent judgment whether evaluating a legal problem or identifying her own strengths and weaknesses. Perhaps most importantly, she displayed a remarkable internal motivation to improve her work and seek out opportunities to stretch her already strong skills. As part of a classroom, she consistently asked interesting, relevant, and self-reflective questions.

Seema has the analytical ability, the dedication to her work, and the overall professionalism to make an outstanding judicial clerk. I give her my highest possible recommendation. Should you have any further questions, please do not hesitate to contact me.

Sincerely,

Andrew W. Williams

Andrew Williams - andrew.williams@nyu.edu - (212) 998-6044

DISTRICT ATTORNEY
KINGS COUNTY
350 JAY STREET
BROOKLYN, NY 11201-2908
(718) 250-2000
WWW.BROOKLYNDA.ORG

Eric Gonzalez
District Attorney

Michelle Munneke
Assistant District Attorney

November 30, 2021

Re: Letter of Recommendation for Ms. Seema Vithlani

Dear Your Honor:

I write to recommend Ms. Seema Vithlani for a judicial clerkship.

I joined the Kings County District Attorney's Office ("Brooklyn DA's Office") in 2017. I have worked as an Assistant District Attorney in the Domestic Violence Unit and in Trial Bureau II in the "Blue Zone." In that capacity, I have prosecuted thousands of cases at every stage including from pre-arrest investigations through trial. Ms. Vithlani stands out as a gifted, professional, and dedicated intern, and I highly recommend her for any judicial clerkship.

Ms. Vithlani helped me prepare and conduct a multi-faceted pre-trial suppression hearing in a Driving While Intoxicated case. Ms. Vithlani assisted in the "Huntley" portion of the hearing (voluntariness of statements), the "Dunaway" portion (whether probable cause existed to arrest), and the "Mapp" portion of the hearing (admissibility of the Breathalyzer results). Specifically, regarding the Huntley hearing, Ms. Vithlani researched whether statements made to EMTs and Paramedics prior to police arriving on scene were admissible, at what time the Defendant became 'in custody' for purposes of Miranda, and additionally, at what time questions transitioned into an interrogation.

Ms. Vithlani successfully wrote a unique Motion for Leave to Reargue in this case on grounds that the Court misapprehended the facts of the testimony elicited at the suppression hearing. Impressively, Ms. Vithlani was eager to undertake the task of filing the equivalent of an interlocutory appeal. Her motion proved to be vital to the outcome of the prosecution.

In all, Ms. Vithlani was a pleasure to work with and was among the most impressive interns I have had the pleasure of working with. I am proud to offer my recommendation on her behalf. I can personally attest to her professionalism and acumen, and I am eager to hear about her successful career as an attorney in the near future.

I hope this letter assists you in making your ultimate decision with respect to Ms. Vithlani's application. Please feel free to call me at (718) 250-3387 if you have any questions or if you would like me to further elaborate on Ms. Vithlani's work.

Best Regards,

Michelle Munneke
Assistant District Attorney
District Attorney's Office, Kings County
350 Jay Street, 11th Floor
Brooklyn, NY 11201
Ph: 718-250-3387
MunnekeM@BrooklynDA.org

Erin E. Murphy
Norman Dorsen Professor of Civil Liberties
New York University School of Law
40 Washington Square South, 419
(212) 998-6672
erin.murphy@nyu.edu

March 16, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

RE: SEEMA VITHLANI

Dear Judge Liman:

It is with utmost pleasure that I write to recommend Seema Vithlani for a clerkship in your chambers. Seema has excelled in every respect as a student at NYU Law, and she will make an exceptional law clerk.

I first met Seema in the Spring of 2019, when she was one of 90 students in my first year Criminal Law course. Although it is a large course, I get to know the students quite well, as my teaching style combines both traditional Socratic inquiry and a significant amount of voluntary class participation. Seema immediately stood out from the crowd with her thorough preparation, insightful comments, and deep understanding of the material.

Of course, her engagement with the material is perhaps not surprising given her later work in the Queens and Brooklyn District Attorneys' offices, as well as EDNY's U.S. Attorney's office. She was always interested in the views of others, and linked key points in the material with her own insights when offering her own comments. I judge students' performance by a combination of factors, including quizzes, attendance of a live session in state court, and a traditional, summative, issue-spotting exam. Seema excelled in all of these efforts, earning an A- that placed her among the very top performers in the class. And as her transcript reflects, she has continued to shine academically, even in the face of the myriad instructional and personal challenges interposed by the pandemic.

In addition to her academic excellence, Seema has the interpersonal and experiential skills that are an asset in any chambers. As Symposium editor of the NYU Journal of International Law and Politics, Seema has had the opportunity to work closely on scholarly projects. She has also served in a leadership role for the South Asian Law Students Association, and served our community as a courtroom advocate and coordinator for the Domestic Violence Advocacy Project. I expect her commitment to public service will continue, and her talents be welcome, whether she starts her career in private practice or the public sector. She also has an interpersonal style that would suit her well in any chambers – she is hard working and easy to get along with.

In short, Seema would make an outstanding law clerk, and I highly commend her to your consideration. If you have any questions or concerns, please do not hesitate to reach out.

Sincerely,

Erin E. Murphy
Norman Dorsen Professor of Civil Liberties
New York University School of Law

RESEARCH MEMORANDUM[1]

RE: Application of Criminal Mischief Statute to Destruction of Property in Which Defendant Has an Interest

FROM: Seema Vithlani, Law Intern

TO: Danielle Reddan, Deputy Unit Chief with the Kings County District Attorney's Office

DATE: April 14, 2020

QUESTION PRESENTED

The question presented is whether the King's County District Attorney's Office can successfully prosecute a criminal defendant under New York's criminal mischief statute for destroying property in which the defendant has an interest.

Specifically, the issues are whether the People can successfully prosecute in the following hypothetical circumstances:

1. A husband and wife own a car together. The husband uses the vehicle as his main car. The wife (the defendant) discovers the husband is unfaithful and damages the car. The husband calls the police.

2. Two sisters own a house together; both are listed on the deed. One sister (the defendant) damages a door and refuses to pay for it. The other sister, who ultimately pays for the repair, calls the police.

[1] Citations in this memorandum conform to New York's citation style rather than the Bluebook.

3. A father (the defendant) buys a cellphone for his teenaged daughter to use. As punishment, the father breaks the phone, and the daughter calls the police.

SHORT ANSWER

Likely, yes.

Though the New York Appellate Division's Second Department in *People v. Person* held that a person cannot be convicted of criminal mischief for destroying property in which he or she has an ownership interest, a 2009 amendment to the criminal mischief statute likely overturned that holding.

Following the amendment, the issue of whether a defendant can be convicted of criminal mischief hinges on whether someone other than the defendant has an ownership interest in the damaged property. In the above-mentioned scenarios involving damage to a co-owned car and a co-owned home, another person—the complainant—clearly has an ownership interest in the damaged property. In the scenario involving damage to a cellphone given by a father to his daughter, the cellphone is likely an absolute gift and the daughter therefore has an ownership interest in the property, though different factual circumstances might change this analysis.

ANALYSIS

I. A person can be convicted of criminal mischief for breaking property in which he or she has an ownership interest.

While the text of the criminal mischief statute and Second Department precedent indicate that a defendant cannot successfully be prosecuted for destroying property in which he or she has an interest, a 2009 amendment to the statute likely overturned that precedent.

A. In 1997, the Second Department held that New York courts could not convict a defendant of criminal mischief for destroying property in which the defendant has an interest.

The text of the criminal mischief statute, Criminal Procedure Law (CPL) §§ 145.00, 145.05, 145.10, and 145.12, states that criminal mischief requires damage to the property "*of another person*." Subsection four[2] of criminal mischief in the fourth degree deviates from this requirement, stating:

> A person is guilty of criminal mischief in the fourth degree when, having no right to do so nor any reasonable ground to believe that he or she has such right, he or she:
>
> (4) With intent to prevent a person from communicating a request for emergency assistance, intentionally disables or removes telephonic, TTY or similar communication sending equipment while that person: (a) is attempting to seek or is engaged in the process of seeking emergency assistance from police, law enforcement, fire or emergency medical services personnel; or (b) is attempting to seek or is engaged in the process of seeking emergency assistance from another person or entity in order to protect himself, herself or a third person from imminent physical injury. *The fact that the defendant has an ownership interest in such equipment shall not be a defense to a charge pursuant to this subdivision*.

CPL § 145.00(4) (emphasis added).

Notably, the legislature emphasized that a defendant's ownership of property is not a defense to criminal mischief under subsection four specifically. This indicates that ownership is otherwise a defense to criminal mischief under other sections of the statute.

Case law precedent supports this interpretation. The Second Department held that a defendant could not be convicted of criminal mischief for damaging or destroying marital property in which he had an equitable interest. *People v. Person*, 239 A.D.2d 612, 613 (2d Dep't 1997) (citing *People v. Schmid*, 124 A.D.2d 896, 897 (3d Dep't 1987); *People v. Kittel*, 36 A.D.2d 730

[2] Subsection two of the statute, which discusses the destruction of abandoned buildings, also does not require the property to be "of another person." CPL § 145.00(2).

(2d Dep't 1971)). In reaching this conclusion, the court cited *People v. Zinke*, 76 N.Y.2d 8, 13 (1990), in which the New York Court of Appeals found that a partner in a limited partnership could not commit larceny of partnership funds because partners hold title to an undivided interest in the partnership. *Person*, 239 A.D.2d at 213. The Second Department in *Person* applied this same notion in the context of criminal mischief. *Id.*

Thus, under the *Person* precedent, a defendant could not be convicted of criminal mischief for damaging property in which he or she had an equitable or ownership interest.

B. A 2009 statutory amendment likely overturned *Person*, though defense counsel may (unpersuasively) argue that the amendment should be applied only in the context of domestic violence.

In many cases of domestic violence, *Person* allowed abusers to damage the property of their victims without criminal liability. Both lower courts and courts in other jurisdictions criticized the case for its application in these contexts. *See, e.g.*, *People v. Kheyfets*, 174 Misc. 516, 522 (Sup. Ct. Kings Cty. 1997) ("[T]he public policy of preventing domestic violence would support a call to the Legislature to apply the criminal mischief statute to the damage and destruction of marital or jointly owned property."); *People v. Brown*, 185 Misc. 2d 326, 336 (Crim. Ct. Bronx Cty. 2000) (criticizing *Person* by noting, "[T]his court has seen many cases where an abusive 'live-in' boyfriend has broken up household furniture or destroyed telephones in order to wreak petty vengeance, to intimidate his girlfriend and/or to discourage calls for help."); *Jackson v. United States*, 819 A.D.2d 963, 966 (D.C. Ct. App. 2003).

Effective in 2009, the New York legislature amended the criminal mischief statute by defining "of another person," which was previously undefined in the statute. Under the

amendment, "property of another" includes "all property in which another person has an ownership interest, *whether or not a person who damages such property, or any other person, may also have an interest in such property*." CPL § 145.13 (emphasis added).

The change was likely motivated by the unjust way in which the *Person* rule was applied to domestic violence contexts. For instance, commentators have noted that because the *Person* holding, "in the context of 'domestic violence,' . . . was unacceptable . . . the Legislature sought to change that result by defining the term, 'property of another.'" *See* William C. Donnino, Practice Commentary, McKinney's Cons. Laws of NY, Book 39, Penal Law § 145.00.

The plain meaning of the amendment indicates that the criminal mischief statute can be applied to convict a defendant regardless of whether he or she has an interest in the damaged property. The amendment only requires that "another person" have an ownership interest in the property.

Although no published appellate court opinion has interpreted the amendment to date, the Second Department, in an unpublished opinion, used this statutory definition to overturn a defendant's conviction of criminal mischief in the fourth degree. *People v. Owens*, 54 N.Y.S.3d 612 (2d Dep't 2017). The defendant had previously been convicted for damaging his wife's bedroom door, even though the defendant owned the house. The defendant's interest in the house was not an issue for the court; rather, the Second Department overturned the conviction because the People had failed to establish that the defendant's wife or "another person" had an ownership interest in the door. *Id.* ("The mere fact that the complainant was married to defendant and slept in the bedroom behind the door which defendant damaged is insufficient, without more, to show that the complainant, or anyone other than the defendant, had any type of ownership interest in the

door."). Though unpublished, this case applies the 2009 amendment in a manner consistent with the amendment's plain meaning.

Lower courts have also interpreted and applied the amended statute similarly. In *People v. Carter*, 43 Misc. 3d 494 (Town Ct. 2014), the court declined to apply *Person*, citing the 2009 amendment. As such, the court denied a motion to dismiss a criminal mischief information in which a defendant damaged the door of a house to which only the defendant had demonstrated title, reasoning that the defendant's wife could have an equitable interest in the house. *Id.* at 498-99; *see also People v. Buck*, 2011 N.Y. Misc. LEXIS 1243 Dkt. No. 49839 at *6-7 (Rome Cty. Ct. 2011) (unpublished) (denying a motion to dismiss a criminal mischief information in light of the 2009 amendment where the damaged property in question appeared to be marital property).

Defense counsel may argue that the amendment should be limited to domestic violence scenarios given the context of the legislature's decision to amend the statute. However, the language of the amendment is broad; it purports to apply to all applications of the criminal mischief statute without limitation. Thus, the People could argue that an interpretation limiting the amendment to cases involving domestic violence would be tantamount to re-writing the statutory text.

In addition, criticism of *Person* was not limited to its application in domestic violence settings; some courts criticized the decision's reasoning overall. For instance, one court, criticizing *Person* by analyzing the statutory text, emphasized that the legislature did not intend to create an exemption for damaged property co-owned by the defendant under the criminal mischief statute, unlike the larceny statute. *Brown*, 185 Misc. 2d at 334 ("*Person* appears to be wrongly decided."). Thus, even if courts were to consider an argument based on the legislative purpose of the

amendment, it is not clear that the legislature intended solely to ameliorate the application of the criminal mischief statute in domestic violence settings.

Therefore, so long as the People can establish that "another person" has an ownership interest in the damaged property, the government can successfully prosecute a defendant for criminal mischief in cases in which the defendant has an interest in the damaged property.

II. In the hypothetical contexts presented above, the People must establish that "another person" has an interest in the damaged property.

As mentioned, courts will likely reject the *Person* standard even in non-domestic violence contexts given the broad language of the 2009 amendment.

Even so, the People must demonstrate that another person has an interest in the damaged property. In the above-mentioned hypothetical scenarios involving a co-owned house and a co-owned car, another person's interest is clear. In the scenario involving a teenaged daughter's use of a cellphone given to her by her father, the daughter likely has an ownership interest in the phone, though this determination depends on whether the cellphone was an "absolute" gift.

A. A family car used primarily by the defendant's spouse is likely considered marital property in which both spouses have an interest.

The ownership interest of spouses in property can be analyzed under Domestic Relations Law § 236(B)(1)(c). *See, e.g.*, *Person*, 239 A.D. 2d at 613. The law states:

> The term "marital property" shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except

> as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property[3] as hereinafter defined.

N.Y. Dom. Rel. Law § 236(B)(1)(c).

Thus, a defendant can be convicted for damaging marital property in which his or her spouse has an ownership interest. *See, e.g.*, *Buck*; 2011 NY Slip Op. 30714(U) at *6-7 (denying a motion to dismiss a criminal mischief information in which the defendant appeared to have destroyed marital property).

In the hypothetical scenario in question, because both the defendant and her husband co-own the car, the defendant can clearly be convicted.

Furthermore, even if the car were considered the defendant's "separate property," the defendant could still be convicted of criminal mischief if her spouse otherwise has an interest under New York's domestic relations law because, for instance, the spouse contributed to the appreciation in value of the "separate property." N.Y. Dom. Rel. Law § 236(B)(1)(d)(3). For example, in *Carter*, 43 Misc. 3d at 497-98, although only the defendant held title to a home that he had damaged, the court denied a motion to dismiss a criminal mischief information because the

[3] The law defines "separate property" as:

> (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
>
> (2) compensation for personal injuries;
>
> (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;
>
> (4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part."

N.Y. Dom. Rel. Law § 236(B)(1)(d).

People could prove during trial that the defendant's wife's indirect contributions or her efforts as a homemaker and parent increased the value of the home. If the People could prove this, the defendant's wife would have an equitable ownership interest in the home (which would otherwise have been considered "separate property) under the domestic relations law. *Id.* As such, a person could have an interest in his or her spouse's "separate property" under certain circumstances.

Thus, in the hypothetical scenario, the wife could successfully be prosecuted under the criminal mischief statute for destroying the car.

B. In the case of two sisters co-owning a house, "another person" clearly has an ownership interest in the house.

The hypothetical scenario involving two sisters who co-own a house would clearly implicate the criminal mischief statute. The complainant sister is a person other than the defendant who has an ownership interest in the real property. This interest extends to the door in question. *See id*. Therefore, the People could successfully prosecute the defendant under the criminal mischief statute for damaging the door.

C. A daughter who was given a cell phone by her father likely has an ownership interest in the cellphone unless the cellphone was a conditional gift or unless the parties had an expectation that the cellphone would be returned.

A person has an ownership interest in property gifted to him or her.

For instance, in *People v. Favors*, 155 A.D.3d 1081, 1084 (3d Dep't 2017), the Third Department, in the context of affirming a robbery conviction, found that cellphones previously gifted by the defendant to his ex-girlfriend and her daughter belonged to the ex and her daughter.

Although the defendant obtained the cellphones and secured and paid for cellphone service, "ownership is not limited to the title owner of the property;" rather, the jury had rationally credited the victims' testimony that the cellphones were gifted to them. *Id.*; *see also Matter of Fenlon*, 95 A.D.3d 1406 (3d Dep't 2012) ("[T]o make a valid *inter vivos* gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee.").

On the other hand, courts have indicated that the mere use or possession of property is not alone sufficient to establish an ownership interest. *See, e.g.*, *Ivory v. Int'l Bus. Machines Corp.*, 116 A.D.3d 121, 128-29 (3d Dep't 2014) (dismissing the plaintiff's private nuisance claim because the plaintiff had no legal ownership interest in a home belonging to his mother, although he had lived there since birth); *United States v. JP Morgan Chase Bank Account No. Ending 8215*, 835 F.3d 1159 (9th Cir. 2016) (in determining whether claimants had possessory or ownership interest in funds seized from a bank account that a third party lent to the claimants, the Court noted, "Unlike an ownership interest, a possessory interest arises even if the claimant is merely 'holding the item for a friend' who has temporarily transferred control of the item to the claimant for safe-keeping.").

In addition, gifts based on the fulfillment of conditions are not absolute. Whether a gift is conditional or absolute "is an ordinary question of intention to be determined by an express declaration in the making of the gift or from the circumstances." *Luce v. Fleck*, 59 Misc. 3d 1084, 1092 (Sup. Ct. Livingston Cty. 2017) (quoting *Lipton v. Lipton*, 134 Misc. 2d 1076, 1077 (Sup. Ct. N.Y. Cty. 1986)) (determining that an engagement ring given by defendant to plaintiff was a conditional gift in contemplation of marriage, but the transfer of an interest in real property may have been an absolute gift). If the condition of the conditional gift is not fulfilled, "the gift is revoked and the [property] must be returned." *Id.* at 1090.

In the scenario in question, it seems likely that the cellphone was given to the daughter for general use without conditions; in that case, the daughter had an ownership interest in the gift, and the People could successfully prosecute the father for criminal mischief. *See, e.g.*, *Favors*, 155 A.D.3d at 1084.

However, if the father had given the cellphone to his daughter with an expectation that the cellphone would be returned, defense counsel could persuasively argue that the father was merely lending the phone to the daughter for use. *See, e.g.*, *Carter*, 43 Misc. 3d at 497. Additionally, if the father had given the cellphone to his daughter with restrictions, defense counsel could argue that the phone was a conditional gift. *See Luce*, 59 Misc. 3d at 1093. For instance, the phone may have been conditioned on good behavior or good grades, and if that condition had been broken at the time of the property damage, the gift of the cellphone would have been revoked. In both cases, the daughter's possession and use of the cellphone would not equate to an ownership interest, and the People could not successfully prosecute the defendant for criminal mischief.

Public policy may inform the court's decision as to whether the cellphone was a gift, as courts may find government interference in parental discipline to be contrary to public policy.

Overall, depending on the circumstances, the People could successfully prosecute the defendant for criminal mischief.

CONCLUSION

Under New York's criminal mischief statute, the People can successfully prosecute defendants who damaged property in which they have an interest so long as the People can establish that a person other than the defendant has an ownership interest in the property.